Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,

Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KENNETH KIMERLING
(CESAR A. PERALES, *Of Counsel*)
Puerto Rican Legal Defense and Education Fund, Inc.
95 Madison Avenue
New York, New York 10016
Tel.: (212) 532-8470
Attorney for Petitioners

Of Counsel:
CHRISTOPHER CROWLEY
JUNE ROSE
JOAN GUGGENHEIMER
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

Questions Presented

In a civil rights action alleging unlawful discrimination in employment, if plaintiffs prove that non-job-related entry-level employment examinations had a discriminatory effect on minority applicants,

1. Must plaintiffs also prove discriminatory intent as a prerequisite to relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and its implementing regulations?

2. Must plaintiffs prove discriminatory intent as a prerequisite to relief under 42 U.S.C. § 1981?

Parties in the Court of Appeals

The parties to the proceedings in the Court of Appeals for the Second Circuit were petitioners (plaintiffs-appellees below) the Guardians Association of the New York City Police Department, Inc., the Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez and Felix E. Santos individually and on behalf of all others similarly situated, and respondents (defendants-appellants below) Civil Service Commission of the City of New York, Department of Personnel of the City of New York, the New York City Police Department, Alphonse D'Ambrose, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, James Smith and Josephine Gambino, individually and in their capacity as members of the Civil Service Commission of the City of New York, and Michael J. Codd, individually and in his capacity as Commissioner of the New York City Police Department.

The Equal Employment Opportunity Commission appeared as *amicus curiae*.

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IN THE

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No.

THE GUARDIANS ASSOCIATION, *et al.*,

Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit dated July 25, 1980.

Opinions Below

The opinions of the Court of Appeals for the Second Circuit setting forth the decision from which review is sought are reported at 633 F.2d 232 and are reprinted in the Joint Appendix (A1-94).* A prior order of the Court of Appeals is also included in the Joint Appendix (A137-38). Two opinions of the District Court are reported at 466 F. Supp. 1273 and 431 F. Supp. 526. The district court opinions and order are set forth in the Joint Appendix (A99-136, 139-95).

* Since respondents are filing a cross-petition for a writ of certiorari the parties have prepared a Joint Appendix. References to (A ——) are to pages in the Joint Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered July 25, 1980 (A95-96). Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on June 1, 1981 (A97-98). This petition for a writ of certiorari was filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

The statutes involved are Title VI, § 601, of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and 42 U.S.C. § 1981. The text of these provisions is set forth in the Joint Appendix (A198-99).

Statement of the Case

This case involves a challenge by black and Hispanic police officers to several written examinations administered by New York City between 1968 and 1970 and used by its Police Department (the "Department" or "NYPD") to make entry level appointments to the Department through 1974. The United States District Court for the Southern District of New York, after a hearing on the merits, ruled that the challenged examinations had a disproportionate impact on minorities and were not job-related, but were not intentionally discriminatory. The district court concluded that petitioners had not proven a violation of either § 1981 or § 1983, which it held required a showing of discriminatory intent, but were entitled to relief under Titles VI and VII, for which proof of disparate impact sufficed. The Court of Appeals for the Second Circuit affirmed the

district court's decision with respect to § 1981 and § 1983 as well as Title VII, but reversed with respect to Title VI on the ground that Title VI requires a showing of discriminatory intent.

Guardians I

In 1972, the Guardians Association, the Hispanic Society, and several minority police officers and applicants* commenced a suit alleging that entry level and promotional examinations administered during the years 1968 to 1970 had a disproportionate impact on the appointment and promotion of minorities in the Department, were improperly prepared, were not job-related, and, therefore, violated the Civil Rights Act, 42 U.S.C. § 1983. In March 1973, the plaintiffs moved for a preliminary injunction against appointments from the eligibility lists generated by these examinations. The district court denied a preliminary injunction against the continued use of lists generated by these examinations on the ground that the lists were soon to be exhausted, and the Court of Appeals affirmed. *Guardians Association* v. *Civil Service Commission*, 490 F. 2d 400, 404 (2d Cir. 1973) (*"Guardians I"*).

Guardians II

In June 1975, respondents laid off approximately 2,800 police officers, of whom 21.5% were minorities. *Guardians Association* v. *Civil Service Commission*, 431 F. Supp. 526, 531 (S.D.N.Y. 1977) (*"Guardians II"*) (A142). On April 30, 1976, petitioners filed the present action alleging that the June layoffs, carried out pursuant to the Department's "last hired, first fired" policy, violated the Four-

* The individual plaintiffs included minority police officers who had unsuccessfully sought promotions within the Department as well as minority applicants who had been denied appointments.

teenth Amendment, 42 U.S.C. §§ 1981 and 1983, Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* and 2000e *et seq.*, and various other state and federal laws (A4). Plaintiffs contended that the challenged examinations not only had a disproportionate impact on pass-rates for minorities, but also caused those minorities who did pass the examinations to do so with lower scores than whites. Since the respondents appointed police officers to the Department in rank order based on their examination scores and laid off the most recent hires first, but for the discriminatory impact of the examinations on minorities, petitioners would have been hired earlier and would thus have had sufficient seniority to withstand the layoffs (A4).

The district court certified the proposed class, comprised of "all black and Hispanic New York City policemen currently on layoff who would not have been furloughed but for defendants' allegedly discriminatory employment practices." (A4-5).

The district court concluded, without discussion, that because a showing of discriminatory intent is required to make out a claim under the Constitution in accordance with *Washington* v. *Davis*, 426 U.S. 229 (1976), it is also required to make out a claim under § 1981 and § 1983. The court found that petitioners failed to establish the requisite discriminatory intent (A65).

With respect to petitioners' Title VII claim, however, the district court concluded that petitioners had established a prima facie case of discrimination in hiring by demonstrating that the challenged examinations had a disproportionate impact on the scores received by black and Hispanic applicants (A5). The court further concluded that respondents had failed to rebut petitioners' case by demonstrat-

ing that the examinations were job-related (A5). Finally, the district court rejected respondents' contention that the examinations were not subject to Title VII. The court held that the 1975 layoff of police officers perpetuated the effects of the Department's pre-1972 discriminatory practices and thus brought those practices within the scope of Title VII (A5-6).

Accordingly, the district court granted a preliminary injunction restraining the Department from firing or recalling officers until the seniority lists were adjusted "to accord plaintiffs the seniority they would have had but for defendants' discriminatory practices." Since the district court afforded relief to all class members under Title VII, it did not reach the issue of petitioners' entitlement to relief under Title VI.

On June 21, 1977, the Second Circuit vacated the preliminary injunction and remanded for reconsideration in light of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), in which this Court ruled that a bona fide seniority system that merely perpetuates the effects of pre-Title VII discrimination is protected by § 703(h) of the statute, 42 U.S.C. § 2000e-2(h)* (A137-38).

Guardians III

On remand, the district court concluded that *Teamsters* did not defeat the Title VII claims of those class members hired after March 24, 1972.** Since some class members

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* That section states, in part, that it is not an unlawful employment practice for an employer to apply different standards or conditions of employment pursuant to a "bona fide seniority or merit system."

** Although the Act was passed in 1964, municipalities were not defined as "employers" subject to Title VII until the Act was amended

(footnote continued on following page)

were hired prior to that date, however, the district court looked to Title VI, which became effective in 1964, to determine whether that statute provided relief to the whole class. The district court concluded that (1) respondents had received a grant of federal funds with a "primary objective" of employment;* (2) there is an implied private right of action under Title VI; and (3) in accordance with *Lau* v. *Nichols*, 414 U.S. 563 (1974), as well as the language and purpose of Title VI as reflected in its implementing regulations, relief under Title VI can be predicated on a showing of discriminatory impact comparable to the showing required under Title VII (A123-35). Accordingly, the district court granted relief to class members hired prior to March, 1972.

Guardians III, on Appeal

On appeal, the Second Circuit affirmed the district court's decision with respect to Title VII liability (A45). The panel, comprised of Judge Meskill and two district court judges—Judge Coffrin and Judge Kelleher—sitting by designation, also unanimously affirmed the district court's rejection of the § 1981 claim on the ground that § 1981 requires a showing of discriminatory intent (A77).

(footnote continued from preceding page)

on March 24, 1972. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2(1).

The court concluded that Title VII offered no relief to policemen hired before March 24, 1972 since discrimination as to them terminated prior to the date the Act became applicable to municipalities and *Teamsters* precluded liability based on a bona fide seniority system even if that system perpetuated the effects of prior discrimination (A114-15).

* Section 604 of Title VI, 42 U.S.C. § 2000d-3, provides that no "department or agency" has authority to act pursuant to Title VI "with respect to any employment practice" unless a "primary objective of the federal financial assistance is to provide employment."

Regarding the Title VI issue, a majority of the *Guardians III* panel concluded that there is an implied private right of action under Title VI* but that a private action under Title VI is governed by a discriminatory intent standard rather than the discriminatory impact standard applied by the court below. In construing Title VI to require proof of intent, Judge Coffrin recognized that *Lau* v. *Nichols*, 414 U.S. 563 (1974), in which this Court applied an impact standard to a Title VI case, "may be read for the contrary proposition" (A93). In addition, he recognized that application of an intent standard to Title VI suits

> "leads to the unhappy anomaly that there would be a more stringent standard for proving illegal discrimination by employers utilizing federal funds than there would be for non-federally-funded employers under Title VII" (A93).

Nevertheless, he concluded that this "unhappy" result was compelled by language expressed or endorsed by a majority of the Justices of this Court in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (opinions of Justices Powell and Brennan). Based on this language, the majority of the panel in *Guardians III* concluded that the intent standard set forth in *Washington* v. *Davis*, 426 U.S. 229 (1976), for claims brought directly under the Constitution governs claims brought under Title VI. Since no purposeful discrimination had been shown, the majority held that the challenged conduct was not actionable under Title VI.**

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* Judge Meskill concluded that Title VI provides no implied private right of action for compensatory relief.

** In a footnote, Judge Coffrin expressed his awareness "of a possible analysis that employs *Lau* and arrives at a different result" (A93). Under such an analysis, *Lau* is read to permit agencies administering Title VI to impose an impact standard in their regulations even if Title VI does not itself require that standard. Without further discussion, Judge Coffrin dismissed this analysis as unconvincing.

The Court of Appeals accordingly vacated the order of the district court and remanded the case for further proceedings in conformity with its opinion (A95-96). The petitioners and respondents both filed petitions for rehearing with suggestions for rehearing *en banc*, petitioners seeking review of the Title VI and § 1981 issues and respondents of the Title VII issues. The Second Circuit denied both petitions on June 1, 1981.

REASONS FOR GRANTING THE WRIT

I.

The Standard for Liability Under Title VI

Petitioners submit that the writ of certiorari should be granted because: (1) the decision of the Second Circuit in *Guardians III* conflicts with the standard for liability under Title VI set forth by this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974); (2) there are conflicting decisions in the courts of appeals with respect to the continued vitality of the *Lau* v. *Nichols* impact standard in light of *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); and (3) the decision below raises important issues of federal law and threatens to thwart the purpose of Congress in enacting Title VI.

A. The Decision of the Court of Appeals Conflicts With the Supreme Court's Decision in *Lau v. Nichols*

Title VI, § 601, of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

> subjected to discrimination under any program or activity receiving Federal financial assistance."

In *Lau* v. *Nichols,* 414 U.S. U.S. 563 (1974), this Court squarely and unanimously held that a showing of discriminatory impact, even without any evidence of discriminatory intent, is sufficient to establish a violation under Title VI and implementing federal regulations promulgated thereunder. *Lau* v. *Nichols* has never been overruled.

Petitioners submit that in *Guardians III* the appellate court reached a result directly contrary to the holding in *Lau,* relying solely on a misinterpretation of *dicta* in *Bakke* and that accordingly this Court should grant this writ of certiorari.

In *Lau* v. *Nichols* non-English speaking Chinese students brought a class suit against officials responsible for the operation of a San Francisco school district alleging that the school district provided unequal educational opportunities in violation, *inter alia,* of the Equal Protection Clause of the Fourteenth Amendment. Both the district court and the Court of Appeals denied relief. This Court, in a unanimous decision, reversed, declining to decide the constitutional issue but holding that plaintiffs had established a violation of Title VI and the implementing regulations promulgated thereunder by showing the challenged conduct had a discriminatory *effect* on minorities:

> "Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or have 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national

> origin.' *Id.*, § 80.3(b)(2)." 414 U.S. at 568 (emphasis in original).

In addition, the Court noted that the federal government has the "power to fix the terms on which its money allotments to the States shall be disbursed," and that Congress intended Title VI to reach all uses of federal funds which have a discriminatory effect, regardless of motive:

> "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or *results* in racial discrimination." 414 U.S. at 569, quoting 110 Cong.Rec. 6543 (1964) (remarks of Sen. Humphrey) (emphasis added).

Thus in *Lau*, this Court, after examining the purpose of Title VI and the interpretation of that statute by the agency charged with its enforcement, unequivocally concluded that a private party alleging violation of Title VI by a recipient of federal funds need show only that the recipient has "utilize[d] criteria or methods of administration" which have discriminatory effects, even if no discriminatory purpose is shown. Both the majority opinion and the concurring opinion of Justice Stewart recognized the force and effect of the agency's regulations.

This case is governed squarely by *Lau*. As in *Lau*, the respondents herein are recipients of federal financial assistance and must comply with Title VI and all regulations promulgated pursuant thereto by the funding agencies.* As in *Lau*, the regulations promulgated by the funding agencies—the Departments of Labor, Justice, and Housing and Urban Development—prohibit the use of "criteria or methods of administration which have the effect of subject-

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* *See* 29 C.F.R. § 31.6; 28 C.F.R. § 42.105; and 24 C.F.R. § 1.5(a).

ing individuals to discrimination," see page 23 below. Respondents were thus required, as a condition of receiving federal financial assistance, to avoid the use of non-job-related examinations which had the effect of discriminating against the petitioners.

The *Guardians III* majority recognized the import of *Lau* v. *Nichols*, but concluded that its currency was undercut by language in the opinions of Justices Powell and Brennan in *Bakke*. In particular, the *Guardians III* majority relied on Justice Powell's statement that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment," 438 U.S. at 287, and Justice Brennan's comment that "Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a state or its agencies," 438 U.S. at 328. Since Justices White, Marshall and Blackmun joined in Justice Brennan's opinion, the *Guardians III* majority concluded that five Supreme Court Justices had endorsed the intent test of *Washington* v. *Davis*, 426 U.S. 229 (1976), in actions brought under Title VI.*

As the district court below recognized (A132-34) however, and as the Third Circuit recently emphasized in *NAACP* v. *The Medical Center, Inc.*, No. 80-1893 (3d Cir. June 29, 1981) (*en banc*) a "requiem" for *Lau* v. *Nichols* is, at best, "premature." Slip op. at 17. *See also Bryan* v. *Koch*, 627 F.2d 612 (2d Cir. 1980) (Kearse, J.,

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* In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court held that in equal protection cases, a showing of purposeful discrimination is required, and that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242. The Court did note that in some cases disproportionate impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.*

concurring in part, dissenting in part); *Lora* v. *Board of Education*, 623 F.2d 248, 252 (2d Cir. 1980) (Oakes, J., concurring); *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 716 (2d Cir. 1979). The language and circumstances of *Bakke* do not support an inference that *Lau* has been overruled.

In *Bakke*, the Supreme Court adjudged the legality under the Constitution and Title VI of the affirmative action admissions program of a state university, a program "designed to assure the admission of a specified number of students from certain minority groups." 438 U.S. at 269-70. Since the challenged preference was concededly intentional, the question of whether or not Title VI covers practices with a discriminatory impact was not before the Court. Instead, the question was what justification, if any, could legitimize a *purposeful* racial classification. *See NAACP* v. *The Medical Center, Inc.*, slip op. at 14-15; *De La Cruz* v. *Tormey*, 582 F.2d 45, 49-50 & n.1 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979); *Guardians III* (Carter, J.) (A134-35).

Viewed in its proper context, it is clear that Justice Powell's statement, quoted by the *Guardians III* majority, means only that a purposeful racial classification does not violate Title VI if that classification would not violate the Constitution.* *See NAACP* v. *The Medical Center*, slip op. at 15-16. Moreover, in response to the *Bakke* petitioners' reliance on *Lau* v. *Nichols* for the proposition that the Supreme Court had approved "discrimination favoring

* Significantly, Justice Powell's comment followed a discussion of legislative history showing that when Title VI was enacted, "[t]he problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys," 438 U.S. at 285, and that Congress intended to cure that problem rather than insure a "purely colorblind scheme." *Id.* at 284.

racial or ethnic minorities," Justice Powell distinguished *Lau* without offering even a hint that *Lau* was no longer good law. 438 U.S. at 304-05.

Similarly, Justice Brennan's comments regarding Title VI, read in the context of a challenge to an affirmative action program, do not support the *Guardians III* majority's disregard of this Court's holding in *Lau*. Justice Brennan, like Justice Powell, directed his attention to intentional "uses of racial criteria" and relied on *Lau's* approval of the regulations promulgated under Title VI as authority for the use of race-conscious measures in appropriate circumstances. 438 U.S. at 351-52.

The key distinctions between *Bakke* and the type of case at issue here were recently summarized by the Third Circuit as follows:

> "The question facing the Court [in *Bakke*], then, was whether some forms of intentional discrimination were nevertheless permissible. A majority of the Court concluded that those forms of intentional discrimination that would survive constitutional analysis also were exempt from Title VI. Congress, in enacting the Civil Rights Act of 1964, did not intend to prohibit those racial preferences that are permitted under the Constitution.
>
> It does not inexorably follow, however, that Congress also intended the constitutional standard to control every allegation of discrimination. It would be consistent with Congress's expansive, remedial intent to interpret Title VI as prohibiting acts that have the effect of discrimination yet permitting patent preferences designed to remedy past discrimination." *NAACP* v. *The Medical Center, Inc.*, slip op. at 15-16.

Petitioners submit that, as the Third Circuit expressly recognized, *Bakke* did not overrule *Lau*,* and that the decision of the *Guardians III* majority therefore conflicts with both this Court's decision in *Lau* and the purpose of Congress in enacting Title VI.

B. There Are Conflicting Decision in the Courts of Appeals

Since *Bakke*, five courts of appeals have addressed the question of whether the discriminatory impact standard set forth in *Lau* applies to private actions under Title VI.** The courts of appeals for the Fifth and Seventh Circuits, as well as the Second Circuit, have concluded that despite *Lau*, discriminatory intent must be shown to establish a violation of Title VI. *Castaneda* v. *Pickard*, No. 79-2253 (5th Cir. June 23, 1981); *Cannon* v. *The University of Chicago*, 648 F.2d 1104 (7th Cir. 1981); *Guardians III*, 633 F.2d 232 (2d Cir. 1980); *Lora* v. *Board of Education*, 623 F.2d 248 (2d Cir. 1980).*** The Court of Appeals for the Third Circuit, sitting *en banc*, recently reached a contrary conclusion. *NAACP* v. *The Medical Center, Inc.*, No. 80-1893 (3d Cir. June 29, 1981) (*en banc*). The Court of Appeals for the Ninth Circuit, like the Third Circuit, has

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* The continued vitality of *Lau* v. *Nichols* is further supported by this Court's post-*Bakke* reliance on *Lau* in *Fullilove* v. *Klutznick*, 448 U.S. 448, 479 -80 (1980). *See* page 24 below.

** Prior to *Bakke*, the Court of Appeals for the Tenth Circuit, citing *Lau*, held that conduct "which has the effect of discrimination even though no purposeful design is present" violates Title VI. *Serna* v. *Portales Municipal Schools*, 499 F.2d 1147, 1154 (1974). In *Otero* v. *Mesa County Valley Schools District*, 628 F.2d 1271 (1980), the Tenth Circuit declined to reach the question of whether *Lau* was overruled or modified by *Bakke*.

*** For a contrary conclusion in the Second Circuit, *see Board of Education* v. *Califano*, 584 F.2d 576, 589 (2d Cir. 1978), *aff'd on other grounds sub nom. Board of Education* v. *Harris*, 444 U.S. 130 (1979).

invoked the impact standard of *Lau* even after *Bakke*, although without analysis of the impact of *Bakke*. *Guadalupe Organization, Inc.* v. *Tempe Elementary School District No. 3*, 587 F.2d 1022 (9th Cir. 1978); *De La Cruz* v. *Tormey*, 582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).*

Those courts of appeals which have concluded that Title VI actions are governed by an intent standard have done so almost summarily. They have relied primarily on Supreme Court dictum rather than on any analysis of the language or purposes of the statute, erroneously assuming that despite *Lau*, language in recent opinions of this Court compelled application of an intent standard.

In *Castaneda* v. *Pickard*, for example, the Court of Appeals for the Fifth Circuit stated that, after *Bakke*, "a majority of the [Supreme] Court has now taken the position Title VI proscribes the same scope of classifications based on race as does the Equal Protection Clause" and that "in order to assert a claim based upon unconstitutional racial discrimination a party must . . . assert and prove that the governmental actor . . . *intended* to treat similarly situated persons differently on the basis of race." Slip op. at 8347. Based upon these two premises, the Fifth Circuit held that "discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employers under Title VI, 42 U.S.C. § 1981 or § 1983." Slip op. at 8347. The opinion includes no dis-

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* Although the Court of Appeals for the Eighth Circuit has not squarely considered what standard to apply under Title VI, in *Jackson* v. *Conway*, 620 F.2d 680 (1980), it affirmed a district court decision which had denied a preliminary injunction on the ground that plaintiffs had failed to show a likelihood that they would succeed in proving disparate impact as required by Title VI. The district court had expressly stated that "intent to discriminate need not be proven" under Title VI. 476 F. Supp. 896, 903 (E.D. Mo. 1979).

cussion of the language or purposes of Title VI, nor is *Lau* v. *Nichols* even mentioned.*

Similarly, in *Cannon* v. *The University of Chicago*, the Court of Appeals for the Seventh Circuit concluded that an intent standard governs Title VI claims of discrimination.** The Seventh Circuit acknowledged the significance of this Court's decision in *Lau* v. *Nichols*, noting that "in the past [Title VI] has been assumed to apply the disparate impact test," 648 F.2d at 1106, but, based on dictum in *Bakke* and *Board of Education* v. *Harris*, 444 U.S. 130 (1979),*** concluded:

> "[A] majority of the Justices of the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an in-

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* The court also failed to note that in *Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976), a pre-*Bakke* case brought under Title VI, § 1981 and § 1983, the Fifth Circuit had applied an impact standard, noting that "[i]t is, of course, beyond dispute that statistical evidence alone may enable the plaintiffs to satisfy their initial burden of showing discrimination." 528 F.2d at 516-17. At the time the *Wade* suit was filed, Title VII was not applicable to state, local or federal government defendants. 528 F.2d at 510 n.1.

** While *Cannon* was a Title IX case, the Seventh Circuit looked to Title VI for guidance as to the proper interpretation of Title IX. Thus, while the *holding* of the Seventh Circuit in *Cannon* was that intent is the appropriate standard under Title IX, that holding was premised on the conclusion that an intent standard applies under Title VI.

*** In *Board of Education* v. *Harris*, this Court held that "discriminatory impact is the standard by which ineligibility under" the 1972 Emergency School Aid Act (ESAA) is to be measured. 444 U.S. at 151-52. The three dissenters—Justices Stewart, Powell and Rehnquist—urged that *Bakke* established an intent standard for Title VI and that the same standard should govern claims under the ESAA. 444 U.S. at 160. The majority, however, expressly stated that there was "no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard." 444 U.S. at 149.

> tentional discriminatory act and that disparate impact alone is not sufficient to establish a violation." 648 F.2d at 1109.

As is discussed above at page 7, in *Guardians III* the Second Circuit similarly premised its conclusion that an intent standard applies primarily on the language in *Bakke*.*

The Court of Appeals for the Third Circuit, sitting *en banc*, however, after carefully examining the opinions of this Court in *Lau* and *Bakke*, as well as in several post-*Bakke* cases, reached an opposite conclusion, finding that "plaintiffs in a Title VI case alleging discrimination in the application of federal funds in a facially neutral program need only establish disparate impact." *NAACP* v. *The Medical Center, Inc.*, slip op. at 18.** Judge Weis, writing for the majority stated,

> "Although there is ample ground for argument that the Supreme Court has doubts about Lau's continued viability, a requiem may be premature and, in

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* The other Second Circuit decisions applying an intent standard, like the Fifth and Seventh Circuit opinions, rely almost exclusively on language in opinions of this Court to justify a departure from the standard set forth in *Lau*. In *Lora* v. *Board of Education*, 623 F.2d 248 (2d Cir. 1980), the majority relied on Justice Stewart's dissent in *Board of Education* v. *Harris, supra*, as support for an intent standard, without even mentioning *Lau* v. *Nichols*, the language or legislative history of Title VI, or the majority opinion in *Board of Education* v. *Harris*, which expressly declined to decide what standard applies in Title VI cases. In the only other Second Circuit case to apply an intent standard—*Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705 (1979)—the panel recognized that *Lau* had not been overruled and based its holding on the narrow ground that in a Title VI case involving school desegregation, unlike an employment discrimination case, "the more appropriate analogy here is to Title IV . . . rather than to Title VII . . . ." 598 F.2d at 716.

** The Court affirmed the finding below, however, that plaintiffs were not entiled to relief even under an impact standard.

> any event, should not be sung by this choir. The prerogative of overruling its cases rests with the Supreme Court, and not with us." *Id.* at 17 (footnote omitted).

See also Bryan v. *Koch*, 627 F.2d at 623 (Kearse, J., concurring in part, dissenting in part); *Lora* v. *Board of Education*, 623 F.2d at 251 (Oakes, J., concurring).

Judge Gibbons, concurring and dissenting in *NAACP* v. *The Medical Center, Inc.*, joined in the relevant part of the majority opinion, agreeing with the majority that Title VI "prohibit[s] not intentional discrimination alone, but also disparate impact" upon the protected classes. Judge Gibbons further stated, "Only an effects standard will encourage decision makers to consider possible discriminatory consequences of a proposal *before* its implementation." Slip op. at 36-37.

Judge Adams, in a separate concurring opinion, found it unnecessary to decide whether *Lau* v. *Nichols* had been overruled by *Bakke*. Nevertheless he, like Judge Weis, recognized that *Bakke* involved a concededly intentional use of racial categories:

> "As the majority explains, *Bakke* focused on the intentional use of racial criteria in the context of voluntary remedial actions. The Supreme Court did not deal with the type question present in this case, namely whether Title VI may impose requirements on recipients of federal funds that are broader than the Constitution demands when faced with disparate impacts resulting from facially neutral actions." Slip op. at 33-34.*

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* Judge Adams also distinguished *Board of Education* v. *Harris*, since "the concern voiced in Harris" was with the possibility that "a violation of Title VI may result in a cutoff of funds." Slip op. at 34. *See Bryan* v. *Koch*, 627 F.2d at 622 (Kearse, J., concurring in part, dissenting in part).

The Ninth Circuit, like the Third Circuit, has relied on *Lau* in post-*Bakke* cases, although without any analysis of the effect of *Bakke* on the vitality of *Lau*. In *Guadalupe Organization, Inc.* v. *Tempe Elementary School District No. 3*, 587 F.2d 1022 (9th Cir. 1978), the court expressly relied on *Lau* but nevertheless found no evidence that plaintiffs had been effectively foreclosed from equal opportunities in violation of Title VI. In *De La Cruz* v. *Tormey*, 582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979), a Title IX case, the court noted that the Supreme Court held in *Lau* that Title VI bars conduct which is discriminatory in effect, even if no discriminatory purpose is present. *Id.* at 61 & n. 16. Although neither *Guadalupe* nor *De La Cruz* analyze the impact of *Bakke*, their continued reliance on *Lau* is plainly at odds with the decisions of the Second, Fifth and Seventh Circuits.

As this Court recognized in *Lau*, " '[s]imple justice requires that public funds to which all taxpayers of all races contribute, not be spent in any fashion which . . . results in racial discrimination.' " 414 U.S. at 569. At present, however, not all plaintiffs have equal access to this "simple justice." The burden on a plaintiff who complains of discrimination at the hands of a recipient of federal funds depends upon where the suit is brought: a plaintiff in the Third, Ninth, and perhaps Eighth or Tenth Circuit need show only discriminatory impact; a plaintiff in the Second, Fifth or Seventh Circuit must meet the far heavier burden of showing discriminatory intent. Petitioners submit that this gross unfairness can only be rectified by clear guidance from this Court.

C. The Decision Below Raises Important Issues of Federal Law

As the Second Circuit recognized, this case "raises a number of important questions in the area of empioyment

discrimination law to which there are as yet no definitive answers." (A2). A "definitive" resolution by this Court of the Title VI issue is particularly appropriate and necessary in this case. The Second Circuit's decision in *Guardians III* not only conflicts with this Court's decision in *Lau* v. *Nichols,* and with the opinion of the Third Circuit in *NAACP* v. *The Medical Center, Inc.,* but it creates an "unhappy anomaly" (A93) by establishing a more stringent standard for proving discrimination against an employer receiving federal funds than against a non-federally funded employer. In addition, the holding threatens the "broad non-discrimination principle" underlying Title VI, 110 Cong. Rec. 7058 (1964) (remarks of Sen. Pastore) and undermines the efforts of agencies charged with enforcing the statute.

1. *The Decision Below Creates an Inconsistency With the Interpretation Given Other Titles of the Civil Rights Acts of 1964 and 1968.*

Title VI was enacted as part of a comprehensive package of legislation, the Civil Rights Act of 1964, designed to eradicate discrimination in public accommodations (Title II, 42 U.S.C. § 2000a *et seq*), education (Title IV, 42 U.S.C. § 2000c *et seq.*), and employment (Title VII, 42 U.S.C. § 2000e *et seq.*). It was followed shortly by the enactment of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, which prohibits discrimination in housing.

In Title IV, Congress specifically provided that the statute would not "enlarge the existing power of the court to ensure compliance with constitutional standards." 42 U.S.C. § 2000c-6. As this Court noted in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 17 (1971), that proviso in Title IV reflected Congress' concern "that the Act might be read as creating a right of

action under the Fourteenth Amendment in the situation of so called 'de facto segregation' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of the State authorities."

In contrast to Title IV, and like Title VI, Titles II, VII and VIII contain no such proviso. It is significant, therefore, that courts interpreting Titles II, VII and VIII have held that proof of conduct that is discriminatory in *effect* is sufficient to establish a prima facie case of discrimination, without any evidence of intent to discriminate.* *See, e.g., Olzman* v. *Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974) (Title II); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1972) (Title VII); *Robinson* v. *12 Loft Realty, Inc.*, 610 F.2d 1032, 1036-37 (2d Cir. 1979) (Title VIII); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (Title VIII); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (Title VIII); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (Title VIII). Indeed the Second Circuit, prior to the decision in this case, had recognized that the distinction between Titles IV and VII might justify an intent standard in Title VI suits alleging discrimination in education, but an impact standard in Title VI suits alleging discrimination in employment. *Compare, Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 716 (2d Cir. 1979) *with Board of Education* v. *Califano*, 584 F.2d 576, 587-

* "[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed." *Richardson* v. *Jones*, 551 F.2d 918 (3rd Cir. 1977) citing *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968).

89 (2d Cir. 1978), *aff'd on other grounds, sub nom. Board of Education* v. *Harris*, 444 U.S. 130 (1979).

Congress, in fact, amended Title VI to clarify this distinction between education cases and the other areas by establishing separate policies for *de facto* and *de jure* segregation. 42 U.S.C. § 2000d-6* and *see Board of Education* v. *Harris*, 444 U.S. 130, 146 n.10 (1979). This amendment would not have been necessary if Title VI required an intent standard.

Congress did not intend that Title VI be treated as an anomaly. This Court should resolve this important question of federal law and interpret Title VI consistently with the other provisions of the Civil Rights Acts of 1964 and 1968.

2. *The Decision Below Is in Conflict With Consistent Agency Interpretation of Title VI*

Title VI directs each granting department or agency to issue regulations so as "to effectuate the provisions of section 2000d." 42 U.S.C. § 2000d-1. In response, virtually every department and agency has promulgated regulations which impose an impact standard on its funding recipients.**

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* Section 2000d-6 provides in part:

> "(a) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.
>
> (b) Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found."

** The sole exception apparently is the Small Business Administration. *See* 13 C.F.R. § 112.

The relevant regulations of the departments that supplied funding to the respondents are published at 29 C.F.R. § 31.3(b)(2), (c)(1) (Labor), 24 C.F.R. § 1.4(b)(2), (c) (Housing and Urban Development), and 28 C.F.R. § 42.104(b)(2), (c)(1) (Justice).

These regulations prohibit recipients from utilizing

> "criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." 29 C.F.R. § 31.3(b)(2). *Accord,* 28 C.F.R. § 42.104(b)(2), 24 C.F.R. § 1.4(b)(2).

It is thus the consistent, virtually uniform position of the agencies charged with enforcing Title VI that the statute prohibits discrimination whether intentional or not. Such agency interpretation is "entitled to great deference." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). The district court below expressly relied on the regulations and this Court's decision in *Lau* as "overwhelming" support for its decision that Title VI imposes an impact standard (132-33).

Moreover, the agencies charged with enforcing a statute may impose an impact standard by regulation, even if the enabling statute does not itself require such a standard. This Court has upheld the use by Congress of an impact standard as an appropriate means of enforcing the Fourteenth and Fifteenth Amendments, which themselves prohibit only intentional discrimination. *City of Rome* v. *United States,* 446 U.S. 156, 177 (1980); *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). Similarly, the federal agencies can adopt an impact standard under Title VI for en-

forcement purposes. Such agency regulations must be upheld and enforced if they are "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publication Service,* 411 U.S. 356, 369 (1973); *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 280-81 and n. 35 (1969).

The parallel between Congress' power to enforce the Constitution and the agencies' powers to enforce Title VI was recently reaffirmed by this Court in *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980):

> "There are relevant similarities between the MBE program and the federal spending program reviewed in *Lau* v. *Nichols,* 414 U.S. 563 (1974). *In Lau,* a language barrier 'effectively foreclosed' non-English speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. *Id.,* at 564-566. It had not been shown that this had resulted from any discrimination, purposeful or otherwise, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of 'criteria or methods of administration *which have the effect* . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] program as respect individuals of a particular race, color, or national origin.' *Id.,* at 568 (emphasis added) . . . Our holding in *Lau* is instructive on the exercise of congressional authority by way of the MBE provision. The MBE program, like the federal regulations reviewed in *Lau,* primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions." 448 U.S. at 479.

The impact standard adopted in the Title VI regulations is clearly an effective means of identifying instances of discrimination by the recipients of Federal financial assistance; the regulations are thus reasonably related to the purposes of Title VI and should be enforced by the courts.

The majority below disregarded the regulations in holding that Title VI requires proof of intentional discrimination. This Court should resolve this important question of federal law and determine that the regulations enforcing Title VI are a valid exercise of administrative power.

II.

The Standard for Liability Under § 1981

The issue of whether plaintiffs must prove intentional discrimination under 42 U.S.C. § 1981 has never been decided by this Court. Petitioners submit that a writ of certiorari should issue to resolve this important question of federal law.

Prior to this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), the lower federal courts had generally held that proof of intentional discrimination was not required to establish a violation of 42 U.S.C. § 1981.*

In *Washington* v. *Davis*, this Court held that proof of intentional discrimination was required to establish an equal

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* *See, e.g., Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *Harper* v. *Mayor and City Council of Baltimore*, 359 F.Supp. 1187, 1200 (D. Md.), *aff'd in pertinent part sub nom. Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1320-21 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Chicano Police Officer's Ass'n* v. *Stover*, 526 F.2d 431, 438 (10th Cir. 1975), *vacated and remanded*, 426 U.S. 944 (1976).

protection violation. 426 U.S. at 238-39. *Washington* v. *Davis* did not, however, decide whether proof of intent was also required under § 1981. Indeed, this Court subsequently granted a writ of certiorari "to consider questions presented as to whether the use of arbitrary employment criteria, racially exclusionary in operation but not purposefully discriminatory, violates 42 U.S.C. § 1981." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 627 (1979) (vacating and remanding as moot). In dissenting from the opinion of the Court vacating the judgment below, Justice Powell noted the importance of the question, "heretofore unresolved." *Id.* at 637.

As the Court below noted, further guidance from this Court regarding the proper interpretation of § 1981 has been "eagerly awaited" since *Washington* v. *Davis* (A68). In the absence of such guidance, many of the courts of appeals faced with this issue* have imposed upon plaintiffs the burden of establishing purposeful discrimination. They have done so, however, by no consistent means of analysis. Some courts have simply treated § 1981 as equivalent to the Equal Protection Clause and therefore governed directly by *Washington* v. *Davis*. *See, e.g., Williams* v. *DeKalb County*, 582 F.2d 2 (5th Cir. 1978); *City of Milwaukee* v. *Saxbe*, 546 F.2d 693, 705 (7th Cir. 1976); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Chicano Police Officer's Ass'n* v. *Stover*, 552 F.2d 918, 920 (10th Cir. 1977). *Contra, Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838 n. 22 (D.C. Cir. 1977) (noting in dictum that § 1981 does not require

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* The courts of appeals for the Third, Fourth, and Sixth Circuits apparently have not decided this question. *See Richardson* v. *Pennsylvania Dept. of Health*, 561 F.2d 489 (3rd Cir. 1977); *United Black Firefighters of Norfolk* v. *Hirst*, 604 F.2d 844 (4th Cir. 1979).

proof of intent, although *Washington* v. *Davis* does impose such a requirement for equal protection claims); *Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979). The First Circuit has endorsed an intent test with no discussion of *Washington* v. *Davis, Des Vergnes* v. *Seekonk Water District,* 601 F.2d 9 (1st Cir. 1979); its decision has been interpreted, however, as having "incorporated the *Davis* intent requirement into a § 1981 claim," *Harris* v. *White,* 479 F.Supp. 996, 1002 (D. Mass. 1979). Still other courts have concluded that while § 1981 was enacted pursuant to the Thirteenth Amendment, its relationship to the Fourteenth Amendment is close enough that the standard of liability prescribed by *Washington* v. *Davis* should apply. *See, e.g., Mescall* v. *Burrus,* 603 F.2d 1266, 1269-71 (7th Cir. 1979); *Johnson* v. *Hoffman,* 424 F. Supp. 490, 494 (E.D. Mo. 1977), *aff'd sub nom. Johnson* v. *Alexander,* 572 F.2d 1219 (8th Cir.), *cert. denied,* 439 U.S. 986 (1978).

Only one circuit, other than the court below, has examined the legislative history, language, and policies underlying § 1981, and concluded that an intent standard applies. *Craig* v. *County of Los Angeles,* 626 F.2d 659 (9th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3617 (S.Ct. Feb. 24, 1981).

As noted above, three circuits have had no occasion to decide the question presented herein. In those circuits, the district courts have been without any guidance regarding the correct standard for liability under § 1981, and they have adopted a variety of analyses, with contradictory results. In the Third Circuit, one district court has concluded that § 1981 was enacted pursuant to the Thirteenth Amendment alone, that any connection between that section and the Fourteenth Amendment was unfounded, that

Washington v. *Davis* consequently was inapposite, and that proof of disparate impact is sufficient in a § 1981 employment discrimination case. *Commonwealth of Pennsylvania* v. *Local Union 542, International Union of Operating Engineers*, 469 F. Supp. 329, 400-01 (E.D.Pa. 1977).

Other courts in the Third Circuit have variously concluded, however, that *Washington* v. *Davis* held that a showing of intent is required under § 1981, *Delgado* v. *McTighe*, 442 F. Supp. 725 (E.D.Pa. 1977); that *Washington* v. *Davis* did not decide the issue, but that constitutional standards should govern because the language and purpose of § 1981 "parallel" those of the Fourteenth Amendment, *Croker* v. *Boeing Co. (Vertol Div.)*, 437 F. Supp. 1138, 1181 (E.D.Pa. 1977); and that an intent standard should apply "in light of the statutory and structural differences between § 1981 and Title VII" and the "historical and conceptual relationship" between § 1981 and the Thirteenth and Fourteenth Amendments, *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service*, 488 F. Supp. 723 (D.N.J. 1980).

The district courts in the Fourth and Sixth Circuits have adopted a similar variety of analyses. *See, e.g., Queen* v. *Dresser Industries, Inc.*, 21 FEP Cases 761 (D.Md. 1978) (*Washington* v. *Davis* held that § 1981 requires proof of intent); *Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 963-66 (D.Md. 1977) (*Washington* v. *Davis* did not decide the issue, § 1981 is based only upon the Thirteenth Amendment, which does not require proof of intent, but *dicta* in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and differences between language and legislative history of § 1981 and Title VII support requirement of intent under § 1981); *Arnold* v. *Ballard*, 448 F. Supp. 1025, 1027-28 (N.D.Ohio 1978) (same, except that § 1981 is based upon Thirteenth and Fourteenth Amendments).

In the absence of guidance from this Court, the lower federal courts have, with some exceptions, concluded that § 1981 requires a showing of purposeful discrimination. For the most part, however, they have done so on only a summary analysis; a number of the courts have erroneously assumed that the issue was foreclosed by *Washington* v. *Davis,* or have held that case to govern without considering the legislative history of § 1981. Among those courts that have considered the history and purpose of § 1981, there is a profusion of contradictory conclusions even as to whether it was enacted pursuant to the Thirteenth Amendment, the Fourteenth, or both.

As the court below noted and this Court recognized in granting *certiorari* in *County of Los Angeles* v. *Davis,* the standard of liability under § 1981 is an important question of federal law. In the absence of a decision on the merits in *County of Los Angeles* v. *Davis,* the question remains unresolved. This Court should grant this petition and determine that § 1981 imposes an impact standard.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: August 31, 1981

Respectfully submitted,

KENNETH KIMERLING
(CESAR A. PERALES, *Of Counsel*)
Puerto Rican Legal Defense and
Education Fund, Inc.
95 Madison Avenue
New York, New York 10016
Tel.: (212) 532-8470

Attorney for Petitioners

Of Counsel:

CHRISTOPHER CROWLEY
JUNE ROSE
JOAN GUGGENHEIMER
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Joint Appendix

81-431

No. 81-432

FILED

AUG 31 1981

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,
Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

No.

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

—against—

THE GUARDIANS ASSOCIATION, *et al.*,
Respondents.

PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

[Counsel Listed on Inside Cover]

KENNETH KIMERLING
(CESAR A. PERALES, *Of Counsel*)
Puerto Rican Legal Defense and
Education Fund, Inc.
95 Madison Avenue
New York, New York 10016
Tel.: (212) 532-8470
Attorney for The Guardians
Association, et al.

CHRISTOPHER CROWLEY
JUNE ROSE
JOAN GUGGENHEIMER
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000
Of Counsel

ALLEN G. SCHWARTZ
Corporation Counsel
100 Church Street
New York, New York 10007
Tel.: (212) 566-3929
Attorney for Civil Service Commission
of the City of New York, et al.

LEONARD KOERNER
JUDITH A. LEVITT
Of Counsel

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Opinions of the Court of Appeals Dated July 25, 1980

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 1340, Docket 79-7377
Argued Aug. 15, 1979
Decided July 25, 1980

The GUARDIANS ASSOCIATION OF the NEW YORK CITY POLICE DEPARTMENT, INC., the Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez and Felix E. Santos; Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

CIVIL SERVICE COMMISSION OF the CITY OF NEW YORK, Department of Personnel of the City of New York, The New York City Police Department, Alphonse D'Ambrose, Individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, James Smith and Josephine Gambino, Individually and in their capacity as members of the Civil Service Commission of the City of New York, and Michael J. Codd, Individually and in his capacity as Commissioner of the New York Police Department,

Defendants-Appellants.

L. Kevin Sheridan, Asst. Corp. Counsel, New York City (Allen G. Schwartz, Corp. Counsel, Leonard Koerner, Judith A. Levitt, Asst. Corp. Counsels, New York City, of counsel), for defendants-appellants.

Laurence A. Silverman, New York City (Christopher Crowley, John J. Brandow, Diane Krejsa, Nancy Ludmerer, D. Stephen Mathias, Margarita Rosa, M. D. Taracido,

Kenneth Kimerling, Puerto Rican Legal Defense and Education Fund, Inc., New York City, of counsel), for plaintiffs-appellees.

Before MESKILL, Circuit Judge, and KELLEHER* and COFFRIN**, District Judges.

MESKILL, Circuit Judge:

This appeal raises a number of important questions in the area of employment discrimination law to which there are as yet no definitive answers. In order to determine the rights of the parties to this action we must explore such concepts as disproportionate impact and job-relatedness and must resolve such issues as when a particular discriminatory hiring practice ceases for purposes of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.;* whether there exists an implied private cause of action for compensatory relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and whether 42 U.S.C. § 1981 prohibits conduct having a discriminatory impact absent proof of discriminatory purpose.

Unfortunately, the authorities do not speak with one voice. The only thing that has been clear, as we have considered this case, is that whichever way these issues are finally resolved, the impact on the future direction of employment discrimination litigation will be substantial. We are aware that because of the importance and complexity of these questions, today's decision will not put them to rest. Therefore, in order to facilitate the continued consideration of these issues in other forums, we have attempted to explain the factual setting and the reasoning underlying our determinations in some detail.

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* Hon. Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

** Hon. Albert W. Coffrin, United States District Judge for the District of Vermont, sitting by designation.

I.

BACKGROUND

In 1972 a lawsuit was brought by black and Hispanic police officers challenging seven written examinations administered during the years 1968-1970 and used in making appointments to the New York City Police Department ("NYPD" or "department") until 1974. The complaint alleged that these entry-level examinations had a racially disproportionate impact and were not job-related and, therefore, that the use by the department of lists ranking eligibility for appointment on the basis of the results of these examinations was unlawful under various federal and state laws. In *Guardians Association* v. *Civil Service Commission*, 490 F.2d 400 (2d Cir. 1973) *("Guardians I")*, this Court upheld the district court's denial of a preliminary injunction against the continued use of these eligibility lists, on the ground that the lists had been exhausted. Neither party took any further steps in regard to *Guardians I* until June of 1975 when, in response to a fiscal crisis, New York City laid off over 2,500 police officers. When plaintiffs' attempt to revive the case proved unsuccessful, they commenced the present action in the United States District Court for the Southern District of New York before Robert L. Carter, *Judge*, in April of 1976.[1]

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[1] Plaintiffs-appellees ("plaintiffs") are The Guardians Association of the New York City Police Department, Inc., The Hispanic Society of the New York City Police Department, Inc., and Oswaldo Perez and Felix E. Santos, individually and on behalf of all others similarly situated. Defendants-appellants ("defendants") are the Civil Service Commission of the City of New York, the Department of Personnel of the City of New York, the New York City Police Department, and various officials representing these three institutions, individually and in their official capacities. The Civil Service Commission prescribes rules for implementing New York's civil service laws. The personnel

In the new action the June layoffs, which were carried out pursuant to the department's "last-hired, first-fired" policy, were alleged to be violative of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, Title VII and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and 2000d *et seq.*, as well as various other federal and state laws. Central to the attack on the system of layoff by seniority was the contention that the department's entry level examinations were discriminatory, and that but for this discrimination plaintiffs would have been hired earlier and thus would have accrued sufficient seniority to withstand being fired.[2] In *Guardians Association* v. *Civil Service Commission*, 431 F.Supp. 526 (S.D.N.Y. 1977) (*"Guardians II"*), Judge Carter certified the proposed class, which consisted of "all black and Hispanic New York City policemen

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department prepares and administers the police department's entry examinations. *Guardians Association* v. *Civil Service Commission*, 431 F.Supp. 526, 531 (S.D.N.Y. 1977) ("Guardians II").

[2] In both *Guardians I* and *Guardians II* plaintiffs attacked the department's minimum height requirements as well as its use of the challenged examinations. Plaintiffs contended that the 5' 7" minimum, dropped by the department in 1973, had, while it was in effect, disqualified a disproportionate number of Hispanics in the pool of potential applicants. Although it had earlier determined that the height requirement was unlawful under Title VII, *Guardians II*, 431 F.Supp. at 550-51, after remand the district court held that a court challenge to the height requirement was barred because as to this particular employment practice there has been no timely filing of a charge with the Equal Employment Opportunity Commission ("EEOC"). *Guardians Association* v. *Civil Service Commission*, 466 F.Supp. 1273, 1278, n. 7 (S.D.N.Y.1979) (*"Guardians III"*). *See* note 7, *infra*. Perhaps because all class members took the challenged examinations and were on that ground alone held entitled to relief, *Guardians III*, 466 F.Supp. at 1280 n. 10, no appeal was taken from this ruling. We therefore express no view on the substantive or procedural issues raised by plaintiffs' challenge to the minimum height requirement. Regarding the propriety of taking the height requirement into account in fashioning a remedy, *see* section VI of this opinion.

currently on layoff who would not have been furloughed but for defendants' allegedly discriminatory employment practices," and granted a preliminary injunction restraining the department from firing or recalling any officers until the seniority lists were reordered "to accord plaintiffs the seniority they would have had but for defendants' discriminatory practices." *Id.* at 531, 530. Judge Carter held that although plaintiffs had failed to make out a case under the federal Constitution, § 1981 or § 1983, they had demonstrated entitlement to relief under Title VII.[3] He found: (1) that under Title VII plaintiffs had established a prima facie case of discrimination in hiring[4] by demonstrating that the challenged entry examinations had a disproportionate impact, that is, that as a group black and Hispanic applicants achieved lower scores than white applicants, and (2) that defendants had failed to rebut plaintiffs' case by demonstrating the job-relatedness of these examinations. Further, rejecting defendants' argument that no post-Act discriminatory conduct had been alleged, the district court held that the 1975 layoff of police officers pursuant to a concededly neutral last-hired, first-fired system perpetuated

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[3] The district court's granting of full relief under Title VII rendered unnecessary any discussion of plaintiffs' Title VI claim. *Guardians II, supra,* 431 F.Supp. at 530 n. 2.

[4] Discrimination in hiring is prohibited by § 703(a)(1) which provides in relevant part:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

the effects of the department's pre-1972 discriminatory practices and thus fell within the scope of Title VII.[5]

On June 21, 1977, this Court vacated the preliminary injunction and remanded the case for reconsideration in light of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which had been handed down after Judge Carter's decision in *Guardians II* but prior to argument of the appeal. *Guardians II*, on appeal, 562 F.2d 38 (2d Cir. 1977). In *Teamsters* the Supreme Court ruled that a bona fide seniority system which merely perpetuated the effects of pre-Title VII discrimination beyond the effective date of the Act was immunized from attack by § 703(h) of the statute.[6] Recognizing that *Teamsters* effectively overruled his earlier determination, Judge Carter reassessed plaintiffs' case in order to determine what claims, if any, survived:

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[5] When the Act was first passed municipalities were not defined as "employers" under Title VII, *see* 42 U.S.C. § 2000e(b), and therefore were not subject to its provisions. The Equal Employment Opportunity Act of 1972, 86 Stat. 103, effective date, Mar. 24, 1972, amended the statute so as to bring municipal employers within its purview.

[6] Section 703(h) of Title VII provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e—2(h).

> Under *Teamsters,* a meritorious Title VII claim against a municipality requires an act of discrimination after March 24, 1972, rather than discrimination before that date whose effects are felt thereafter through a facially neutral seniority system. . . . If plaintiffs can now show that the results of [the discriminatory] entrance tests contributed to discriminatory acts committed *after* March 24, 1972, the *Teamsters* requirement will have been met.

Guardians Association v. *Civil Service Commission,* 466 F.Supp. 1273, 1276-77 (S.D.N.Y. 1979) *("Guardians III").*

The district judge reasoned that "[s]tripped of the argument concerning the NYPD's seniority system, plaintiffs' allegations are reduced to claims of discriminatory refusals to hire." *Id.* at 1277. Noting that "[d]iscriminatory refusal to hire is a well established basis for awarding a discriminatee seniority retroactive to the date upon which he would have been hired but for the discrimination," finding that the last such refusal to hire ceased on October 7, 1974, two years after Title VII was made applicable to municipalities, and finding further that a timely charge had been filed with the Equal Employment Opportunity Commission ("EEOC"),[7] Judge Carter concluded that plaintiffs were entitled to relief under Title VII. *Id.* at 1277-78.

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[7] The filing of a timely charge with the EEOC is a prerequisite to a private action under Title VII. *See* § 706(e) of Title VII, 42 U.S.C. § 2000e—5(e); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668 (1973); *Silver* v. *Mohasco Corp.,* 602 F.2d 1083, 1087 (2d Cir.), *rev'd on other grounds,* —— U.S. ——, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). The parties agree that the 300 day limitation period, the longer of the two limitation periods established by § 706(e), is applicable in the instant case.

A charge filed on behalf of the Guardians Association on May 23, 1975, was held by the district court to encompass a claim of discriminatory refusal to hire. *Guardians III,* 466 F.Supp. at 1278. Particularly in light of the liberality with which such charges are to be

Judge Carter declined to limit relief to those plaintiffs who had been refused employment at some point within the 300 days preceding the filing of the EEOC charge. Relying on *Acha* v. *Beame*, 570 F.2d 57 (2d Cir. 1978), the district court held that the use of the eligibility lists to determine the order in which applicants were hired amounted to a continuing policy of discriminatory hiring and thus a continuing violation of Title VII.

> The refusals to appoint minorities were not discrete acts; they were all made on the same basis, *viz.*, scores on the defective tests. After the tests were administered and the results certified, the NYPD embarked on a discriminatory hiring program which terminated only when the last person was hired off the lists. Since E.E.O.C. charges were filed within 300 days of the last illegal appointment, all plaintiffs are deemed to have made timely challenge to the defendants' discriminatory actions.

Guardians III, 466 F.Supp. at 1280. Ruling that the rehiring of members of the original class had not mooted the case, Judge Carter revised the class definition to include all black and Hispanic policemen "previously on layoff who would not have been furloughed but for defendants' discriminatory practices." *Id.* at 1278.

Having determined that the types of relief sought under Title VII could not properly take into account any conduct

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construed, *Silver* v. *Mohasco Corp.*, *supra*, 602 F.2d at 1090-91, we will not disturb this finding. On appeal, defendants do not challenge the district court's ruling giving the entire plaintiff class the benefit of this filing. *See Guardians III*, 466 F.Supp. at 1278 n. 6, *citing Acha* v. *Beame*, 438 F.Supp. 70, 76 (S.D.N.Y. 1977), *aff'd*, 570 F.2d 57 (2d Cir. 1978); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 985 n. 11 (D.C.Cir.1973).

occurring before March 24, 1972, Judge Carter considered plaintiffs' Title VI claim in order to determine whether additional relief was available. After reviewing the legislative history of the statute and the relevant cases, Judge Carter held first, that § 601 impliedly conferred a right of action on private individuals, and second, that Title VI banned both intentional discrimination and conduct which has a discriminatory impact. In light of the fact that unlike Title VII, Title VI has been applicable to municipalities since 1964, Judge Carter concluded that all members of the plaintiff class were entitled to compensatory seniority extending back to the date upon which they would have been hired but for defendants' discriminatory practices. The preliminary injunction which had been vacated by this Court was therefore reinstated by order dated May 15, 1979. This appeal followed.[8]

As a preliminary matter, defendants dispute Judge Carter's finding that the challenged examinations were discriminatory, that is, that they had a disproportionate impact not justified by a showing of job-relatedness. Defendants also contend that even if the examinations were discriminatory, any discriminatory conduct on their part ceased before Title VII became applicable to municipalities and, further, was not the subject of a timely filing with the EEOC. Additionally, defendants take issue with Judge Carter's analysis of Title VI. They argue that the statute is addressed only to purposeful discrimination. Endorsing the district court's rejection of § 1981 as a basis for relief, defendants conclude that plaintiffs have failed to make out a case for the readjustment of their seniority. In response, plaintiffs urge the soundness of the district court's factfinding, the inevitability

[8] On August 15, 1979, this Court granted a partial stay of Judge Carter's order of May 15, 1979, pending disposition of the appeal.

of its approach to the Title VII and Title VI issues, and the propriety of the relief granted. The EEOC, as amicus curiae, addresses solely the § 1981 issue, urging that this Court reject the intent standard announced below.

Although this is the second time this case has come before us, we have not previously reviewed either the factual findings or the legal conclusions reached by the district court.[9] We start with the contested issues of fact.

II.

THE CHALLENGED EXAMINATIONS

In *Guardians II*, Judge Carter set forth accurately and succinctly the proper method of evaluating the challenged examinations under Title VII: [10]

> In *Griggs* v. *Duke Power Co.* [401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)], the Supreme Court held that Title VII forbids the use of employ-

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[9] As we noted above, this Court vacated the original preliminary injunction in June of 1977, 562 F.2d 38 (2d Cir. 1977), without reaching the merits of the appeal and directed Judge Carter to reconsider the case in light of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

[10] Defendants do not claim that the hiring process, viewed as a whole, ameliorated any disproportionate impact created by the written examinations. We therefore need not decide today whether under Title VII, selection procedures must be judged in isolation from one another or whether an employer's entire hiring process must be judged by its end results. *Compare Brown* v. *New Haven Civil Service Board*, 474 F.Supp. 1256, 1260-61 (D.Conn. 1979) (holding that plaintiffs may not challenge disproportionate impact of written exam that forms only one part of hiring process the end result of which is not disproportionate; "number of Blacks hired as a percentage of the Black applicants is roughly the same as that for Whites") *with Guardians II*, 431 F.Supp. at 540. *See* Uniform Guidelines, 29 C.F.R. § 1607.4(C). The Uniform Guidelines are discussed in note 16, *infra*.

> ment selection practices that have a racially discriminatory impact unless the employer meets "the burden of showing that [the selection practices have] . . . a manifest relationship to the employment in question." *Id.* at 432, [91 S.Ct. at 854]. This burden arises only after the complaining party or class has made out a prima facie case of discrimination. The Court held in *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, [95 S.Ct. 2362, 45 L.Ed.2d 280] (1975) that a prima facie case is made out if the complainants can show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425, [95 S.Ct., at 2375]. *See also McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, [93 S.Ct. 1817, 36 L.Ed.2d 668] (1973). A showing of discriminatory purpose need not be made under Title VII. *Griggs, supra; Albemarle, supra.*

431 F.Supp. at 538. Under the "clearly erroneous" standard of review, we see no basis for overturning the factual findings which prompted Judge Carter to conclude that, judged by this standard, the examinations were discriminatory.[11] Fed. R.Civ.P. 52(a).

A. *Disproportionate Impact*

In 1973 the parties to the *Guardians I* suit authorized the Rand Institute to conduct an independent study of NYPD's entry level examinations to determine the passing rates of

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[11] As a detailed account is available in the district court's published opinion, *Guardians III*, 466 F.Supp. 1273, we summarize only so much of Judge Carter's comprehensive treatment of the evidence upon which he relied as is necessary to make clear why his finding of disproportionate impact must stand.

whites, blacks, and Hispanics.[12] The results of two examinations were analyzed; these tests, one administered in 1968 and one in 1970, were respectively the earliest and the most recent tests with eligibility lists still in use at the time of the study.

As the district court noted, because the department did not keep systematic records of the race or ethnic background of applicants, Rand relied on various indirect methods of racial and ethnic identification.

Five different sources of data were used:

> (1) [NYPD] records giving the race of about 30 percent of the applicants taking each examination; (2) results of a questionnaire inquiring into race which was mailed to nearly all persons who took the examinations; (3) a compilation of approximately 8,000 surnames compiled by the U.S. Bureau of Census with which the subjects' names were compared; (4) census tract data, evidencing racial residential concentration with which the subjects' addresses were matched; and (5) a telephone sample of the subjects whose race remained unknown after the [NYPD] data and the questionnaire data were on hand.

Guardians II, supra, 431 F.Supp. at 539 (footnote omitted). On the basis of the information thus gathered, Rand determined the racial or ethnic identity of those taking each examination. Rand then proceeded to estimate the distribution by group of the scores. In summarizing its findings, Rand stated:

> "[w]e have found substantial and statistically significant differences by race in the distributions of exam

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[12] The district court, apparently adopting the usage of the Rand Report, referred to the categories of white, black and Hispanic as three distinct "racial" groups for purposes of statistical analysis.

> scores for whites as compared to blacks and Hispanics . . .. Blacks and Hispanics scored lower than whites and failed at higher rates . . .. These findings were confirmed by three different methods of data analysis." Rand Report at 46.

Guardians II, 431 F.Supp. at 540 (footnote omitted). Furthermore, because of the similarity of the patterns observed for the two examinations analyzed, Rand concluded that it was "confident" that these patterns were " 'most likely typical of the patterns for all recent civil service patrolmen's exams.' " Rand Report at 38, quoted in *Guardians II*, 431 F.Supp. at 540.

At the hearings held before the initial issuance of the preliminary injunction, each side presented expert testimony regarding the significance of the Rand Report. As Judge Carter noted, the methodological criticisms offered by defendants' witness were seriously undercut by the fact that Rand came up with similar figures using three different methods to estimate the distribution by group of the scores. Similarly, while only two of the challenged tests were studied by Rand, the similar distribution patterns made reasonable the inference that similarly drawn examinations would yield similarly skewed results. Although defendants attempted to cast doubt on the accuracy of the Rand finding of disproportionate impact, they offered no evidence tending to establish that white, black and Hispanic applicants performed equally well, or comparably, on any or all of the challenged examinations.[13] Finally, since the methodology

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[13] We see no justification for holding plaintiffs to an unrealistic standard regarding the "completeness" of their statistical showing. As Judge Weinfeld observed in *Vulcan Society* v. *Civil Service Commission*, 360 F.Supp. 1265, 1270 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973), "where public employment practices are under challenge

was derived and the data compiled by independent professionals selected by agreement of the parties, we have no reason to question the objectivity of the research.

On the basis of the record before us we cannot conclude that Judge Carter's finding of disproportionate impact was clearly erroneous. Defendants attack the Rand study as guesswork. However, the fact that Rand was required to estimate the racial and ethnic composition of the applicant pools and the distribution by group of the scores does not invalidate Rand's conclusions. The science of statistical

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defendants usually have superior access to relevant statistical data than plaintiffs and . . . the latter will often be dependent on the efforts and good faith of the former." For this reason it is not inappropriate to expect a public employer to come forward with evidence on the disparate impact issue even where the plaintiffs' showing has been somewhat modest.

In the instant case, although the Rand study focused on only two examinations, plaintiffs offered sufficient evidence to support the inference that *all* the challenged examinations had a disparate impact on blacks and Hispanics. Defendants were unwilling or unable to introduce persuasive evidence indicating otherwise. They introduced no statistics tending to show that even one of the examinations was in fact neutral in impact. On the contrary, the results of defendants' own study of one challenged examination, given in 1969 and not included in the Rand study, indicates that defendants' information would tend to confirm rather than contradict the Rand conclusion. (Exhibit K to Crawley Affidavit.) Furthermore, defendants offered no persuasive evidence of differences in preparation or content that would cast doubt on Rand's conclusion that the two examinations studied were representative of all those given in the years 1968 to 1970.

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspiciously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made.

Dothard v. *Rawlinson*, 433 U.S. 321, 331, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977) (footnote omitted).

analysis encompasses more than the mere notation of directly observed phenomena. Necessity often dictates that the composition of a given population be estimated by projecting data gathered by less than optimal means from only a sample of that population. If the sample is adequate, the data gathering techniques reliable, and the conclusions drawn demonstrated to be statistically significant, such estimates and projections may properly be admitted into evidence.[14]

> [S]tatistical evidence by its very nature deals with probabilities rather than certainties. All that can be required of methods employed in gathering such evidence is that they assure reasonably accurate findings. Absolute perfection usually is not attainable in this kind of endeavor.

Vulcan Society v. *Civil Service Commission*, 360 F.Supp. 1265, 1270 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) (footnote omitted). Not being generally obtainable, "absolute perfection" is not required. *See, e.g., Jones* v. *New York City Human Resources Administration*, 528 F.2d 696, 698 (2d Cir.), *cert. denied*, 429 U.S. 825, 97 S.Ct. 80, 50 L.Ed.2d 88 (1976). As Judge Friendly wrote, affirming the district court's decision in *Vulcan Society* and quoting Mr. Justice Holmes:

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[14] Despite defendants' protestations this case is not like *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584-85, 99 S.Ct. 1355, 1365, 59 L.Ed.2d 587 (1979), where, of the two crucial statistics relied on to establish the discriminatory impact of a particular employment practice, one was substantially overinclusive and the other substantially underinclusive. In *Beazer*, the problem was not that it was necessary to make estimates and projections from incomplete data but rather that there was no information in the record from which the required estimates and projections could properly be derived.

> It may well be that the cited figures and other more peripheral data relied on by the district judge did not prove a racially disproportionate impact with complete mathematical certainty. But there is no requirement that they should. "Certainty generally is illusion, and repose is not the destiny of man." We must not forget the limited office of the finding that black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume.

490 F.2d at 393 (footnote omitted).

B. *Job-Relatedness*

Under the familiar Title VII formula, since plaintiffs established a prima facie case of discrimination,[15] the burden shifted to defendants to demonstrate that the challenged examinations were job-related. *Dothard* v. *Rawlinson*, 433 U.S. 321, 329. 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977).

> A job-related examination is one that accurately tests the capacity of the applicant to do the job for which he is applying, or is "reasonably constructed to measure what it purports to measure." Although this notion is a simple one, the task of determining whether an examination is in fact job-related involves issues and

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[15] It is well established that "[a] prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities." *New York City Transit Authority* v. *Beazer*, *supra*, 440 U.S. at 584, 99 S.Ct. at 1365. *See also International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 339-40, 97 S.Ct. at 2731-2732.

> and problems which are outside the experience of most laymen. Consequently, courts confronted with litigation of this kind have placed considerable reliance upon generally accepted principles of psychological testing which have been developed for the purpose of assuring that employment . . . tests measure what they purport to measure. Indeed, insistence upon the use of generally accepted professional standards of employment test validation would appear to be precisely the correct response to a prima facie showing of discriminatory impact upon racial minorities; for if an examination which disadvantages racial minorities does in fact conform to professional standards of job-relatedness, that provides at least some assurance that the white majority has not placed a burden upon racial minorities which it would have been unwilling to place upon others.

Vulcan Society, supra, 360 F.Supp. at 1272-73 (footnotes omitted). *See also Blake* v. *City of Los Angeles,* 595 F.2d 1367, 1377-79 (9th Cir. 1979).

Although defendants argued below that the validity of the entry-level examinations had been demonstrated by two different generally accepted methods,[16] after considering

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[16] The courts in this Circuit have recognized three methods of demonstrating the job-relatedness of an employment examination. As the Supreme Court noted in *Washington* v. *Davis,* 426 U.S. 229, 247 n.13, 96 S.Ct. 2040, 2051 n.13, 48 L.Ed.2d 597 (1976), the professional testing standards developed by the American Psychological Association ("APA") accept the same three methods:

> "empirical" or "criterion" validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); "construct" validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable

the testimony of experts called by both sides, Judge Carter determined that defendants had failed to carry their burden.[17] On the record before us we cannot characterize this finding as erroneous.

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characteristics that have been determined to be important in successful job performance); and "content" validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant).

In 1970 the EEOC promulgated its Guidelines on Employee Selection Procedures ("EEOC Guidelines"), 35 Fed.Reg. 12333 (Aug. 1, 1970). These EEOC Guidelines remained in effect until they were superseded in 1978 when the EEOC (along with the Civil Service Commission, the Department of Labor, the Department of Justice, and the Treasury Department) adopted the Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines"), 43 Fed.Reg. 38290, 40223 (Aug. 25, 1978; Sept. 11, 1978). Both the EEOC Guidelines and the Uniform Guidelines recognize the three basic methods of test validation accepted by the APA.

The Supreme Court has held in both *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971) and *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280 (1975), that the EEOC Guidelines express the will of Congress in passing Title VII and are entitled to great deference. Since both the EEOC Guidelines and the Uniform Guidelines shed light on the concept of job-relatedness and since the differences between the two sets of Guidelines are of no significance in the instant case, we will make reference to both in our discussion. *Compare* Uniform Guidelines, 29 C.F.R. § 1607.1-14 (1979) *with* EEOC Guidelines, 29 C.F.R. § 1607.1-14 (1971).

[17] Defendants suggest in their brief that as a municipal employer not charged with bad faith, the department should be held to a somewhat relaxed standard of job-relatedness. However, the cases indicate that Title VII, as amended, holds public and private employers to the same standards. *Dothard* v. *Rawlinson, supra,* 433 U.S. at 331-32 n.14, 97 S.Ct. at 2728 n.14.

Although expressing doubt as to the constitutionality of Title VII thus interpreted, defendants recognize that this question, not having been raised in the district court, is not properly before us. *Id.* 433 U.S. at 323 n.1, 97 S.Ct. at 2724 n.1. *See,* for a discussion of the constitutional issue, *Blake* v. *City of Los Angeles,* 595 F.2d 1367, 1372-74 (9th Cir. 1979).

1. *Content Validity*

> An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job.

Vulcan Society, supra, 360 F.Supp. at 1274 (footnotes omitted). The logical first step in drafting a content valid test is a careful study of the job in question.[18] *See Jones* v. *New York City Human Resources Administration,* 391 F. Supp. 1064, 1077-83 (S.D.N.Y. 1975), *aff'd,* 528 F.2d 696 (2d Cir.), *cert. denied,* 429 U.S. 825, 97 S.Ct. 80, 50 L.Ed. 2d 88 (1976); *Kirkland* v. *New York State Department of Correctional Services,* 374 F.Supp. 1361, 1373 (S.D.N.Y. 1974), *aff'd in pertinent part,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). Judge Weinfeld has defined a proper job analysis as:

> a thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill. It is conducted by interviewing workers, supervisors and administrators; consulting training manuals; and closely observing the actual performance of the job.

Vulcan Society, supra, 360 F.Supp. at 1274. Because of the unlikelihood that an examination prepared without benefit

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[18] *Cf.* Uniform Guidelines, 29 C.F.R. § 1607.14C(2) (1979); EEOC Guidelines, 29 C.F.R. § 1607.5(b)(3) (1971).

of a probing job analysis will be content valid, Judge Weinfeld has suggested that in the absence of such an analysis the proponent of the examination carries a greater burden of persuasion on the issue of job-relatedness. In affirming *Vulcan Society,* this Court enthusiastically adopted this sliding scale approach to content validity, explaining that taking the quality of test preparation into account in judging test validity would be useful in lessening "the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand." *Vulcan Society, supra,* 490 F.2d at 396.

Although they never introduced a formal, written job analysis, defendants maintain that their method of preparation nevertheless ensured the content validity of the examinations.[19] Conspicuous by its absence from the preparation process, however, was a critical component of a proper job analysis as defined by Judge Weinfeld in *Vulcan Society*: observation of the actual performance of the typical officer's

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[19] The testimony of the former director of examinations for the Department of Personnel, as summarized by Judge Carter, makes it clear that while care was taken in the construction of the tests, no first-hand observation and analysis of the content of police work were undertaken.

> [T]he actual preparation of the examinations in issue encompassed review of files of previous tests; review of materials available in the library of the Bureau of Examinations; review of the Patrol Guide rules giving the procedures of the Police Department; contact with the Police Department concerning any special conditions warranting particular attention; the drafting of a notice of examination; and finally the construction of the actual test itself, using the various material described above.

Guardians II, 431 F.Supp. at 543 (footnote omitted). The more meaningful job analysis performed by the department in preparing a later test—No. 8155, administered in June of 1979—provides an interesting contrast. *See Guardians Association* v. *Civil Service Commission,* 630 F.2d 79 (2d Cir. 1980).

daily routine. The examination preparation process therefore fails to raise any inference that the content of the job was accurately reflected in the content of the examination.

At the hearing below the former director of examinations for the City's Department of Personnel testified that in his opinion the tests were content valid, but he offered no reasons in support of his position. In contrast, plaintiffs' expert, Dr. Richard S. Barrett, "was able to point with specificity to serious deficiencies in the content of the examinations." For example, Dr. Barrett viewed questions pertaining to "civic awareness," "space and figure relations," and "coding" as failing to test for the content of a police officer's job. *Guardians II*, 431 F.Supp. at 544. Most significantly, Dr. David Hall, called by *defendants*, agreed that questions in these same three areas did not test skills important to the job and did not warrant inclusion in the department's entry-level examinations.[20]

Attempting to establish the content validity of the challenged examinations by indirect as well as direct means, defendants contend that they were successful in developing a valid examination in 1973[21] and that the challenged examinations test for content areas comparable to the later, valid examination. Finding the second assertion to be inaccurate, the district court did not consider the first. Judge Carter found that the contents of the later test varied "substantially" from that of the earlier ones. Defendants'

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[20] Dr. Hall was involved in the preparation of examination number 3014, administered in 1973 and not challenged on this appeal. *Guardians II*, 431 F.Supp. at 544.

Examples of the three categories of questions identified by both Dr. Barrett and Dr. Hall as not meriting inclusion in defendants' entry-level examinations are included in the Appendix.

[21] *See* note 20, *supra*. Plaintiffs do not concede the validity of examination number 3014. *Guardians II*, 431 F.Supp. at 545 n.36.

conclusory representation that the acknowledged differences in content between the later examinations and the challenged examinations are of no moment are simply unsupported by the evidence. Furthermore, defendants' contention that substantial percentage differences in content areas—conceded to exist between the challenged tests and the purportedly valid examination—are insignificant flies in the face of both intuition and precedent. As noted above, a content valid examination must not only test required skills and aptitudes, it must test them "in proportion to their relative importance on the job . . . ." *Vulcan Society, supra,* 360 F.Supp. at 1274.

2. *Criterion-Related Validity*

Criterion-related validity studies correlate test scores with job performance. To establish the criterion-related validity of the challenged examinations, defendants introduced the testimony of Dr. William Weechun, a researcher at the New York City Board of Education, who had made a study demonstrating that the examinations employed between 1968 and 1970 were good predictors of success at the Police Academy for whites, blacks, and Hispanics. However, no attempt was made to correlate performance on the examinations or at the Academy with performance on the job.[22] Defendants contend that under *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), such a showing is unnecessary. Judge Carter properly rejected this contention.

In *Vulcan Society,* a case decided before *Washington* v. *Davis,* this Court recognized that in the absence of a show-

[22] *Cf.* Uniform Guidelines, 29 C.F.R. § 1607.15B(3) and (5) (1979); EEOC Guidelines, 29 C.F.R. § 1607.5(b)(3) and (4) (1971).

ing that examinations testing performance at training school are themselves job-related, evidence that qualifying examinations predict performance on training school exams is "barren." 490 F.2d at 396 and n.11. *Accord, Pennsylvania* v. *O'Neill,* 348 F.Supp. 1084, 1090 (E.D.Pa. 1972), *aff'd in pertinent part,* 473 F.2d 1029 (3d Cir. 1973); *United States* v. *City of Chicago,* 385 F.Supp. 543, 556 (N.D.Ill.1974); *Officers for Justice* v. *Civil Service Commission,* 371 F.Supp. 1328, 1337 (N.D.Cal.1973). Judge Carter's analysis of the instant case makes clear why that is so:

> Defendants' study demonstrates a high correlation between performance on the challenged examinations and performance at the Academy, but the task of correlating the examinations to actual performance as police officers remains unaccomplished. The repective positions of the parties would be unchanged if, for example, instead of giving these entry level examinations, the [NYPD] had enrolled the same group of individuals in the Academy. Because of the established correlation, standing on completion of training at the Academy would, presumably, approximate standing achieved at the entry level examinations. That is to say, a consistently higher proportion of whites than minorities would achieve passing grades, and a large majority of the highest achievers would be white. Accordingly, the greatest number of Academy graduates first hired would be white, and the greatest number of those first fired would be Academy graduates who are black and Hispanic. In a Title VII attack in that situation, plaintiffs' prima facie case would be established by showing, as here, the disproportionate

> impact of Academy procedures and testing on minorities. Defendants would be required to demonstrate that those testing practices are job-related, as they are required here to do in respect of the entry level examination. By introducing Academy performance as a correlate to the examinations, defendants cannot avoid their obligation to show job-relatedness.
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> To provide that missing ingredient defendants would have this court find job-relatedness on the basis of a high correlation between the results of two separate testing practices, neither of which by itself has been validated according to accepted methods. We cannot accept this flawed argument.

Guardians II, 431 F.Supp. at 546-47. Nor can we.[23] Nor do we regard *Washington* v. *Davis, supra,* as requiring us to ignore the degree to which adoption of defendants' position would undermine Title VII's goal of eliminating arbitrary barriers to the employment of minorities.

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[23] As hearing testimony of former New York City Police Commissioner Patrick Murphy indicates, concern that success in training school may not necessarily be predictive of success on the job is not confined to those unfamiliar with police work.

> Q. In your opinion, is there a correlation between performance in general at the Police Academy and performance on the street as a patrolman?
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> A. I don't think there is a strong correlation, because once again, the tests at the Police Academy are in a classroom kind of situation remote from the realities of street performance and I think those tests are weak indicators of what actual performance will be in the field.
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> * * * * * *
>
> Satisfactory performance at the Police Academy . . . [is] dramatically different than field performance.

Mr. Murphy was formerly Commanding Officer of the Police Academy.

In *Washington* v. *Davis,* two unsuccessful applicants ("plaintiffs")[24] alleged that the recruiting procedures of the District of Columbia's metropolitan police force were racially discriminatory. Plaintiffs contended that these practices violated their rights under the due process clause of the Fifth Amendment, under § 1981, and under a section of the D.C.Code requiring that government jobs not be awarded or withheld on the basis of race or certain other specified factors. No violation of Title VII was alleged. One of the challenged practices was the use of "Test 21," a written examination developed by the Civil Service Commission and widely used throughout the federal service to test verbal, reading, and comprehension skills. To be accepted into the police training program an applicant was required to achieve a score of 40 out of 80 on Test 21 and to meet certain other physical and character standards. Plaintiffs made no claim of purposeful discrimination; they claimed only that Test 21 had a disproportionate impact and bore no relationship to job performance. The validity of Test 21 was the sole issue before the district court on cross motions for summary judgment.

The Supreme Court declined to hold "that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII . . . . " *Id.* 426 U.S. at 239, 96 S.Ct. at 2047. The Court ruled that unlike the more rigorous Title VII standard,

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[24] Although *Washington* v. *Davis, supra,* began as a challenge to the promotion policies of the District of Columbia police force, two blacks whose employment applications had been rejected by the department were permitted to intervene and to challenge its recruitment practices. Only the recruitment phase of the case was involved in the appeal to the Supreme Court. For the sake of simplicity, we have followed Judge Carter in referring to the *Washington* v. *Davis* intervenors as "plaintiffs."

the constitutional standard is concerned only with action reflecting a racially discriminatory purpose; disproportionate racial impact standing alone does not constitute a denial of equal protection.[25] Comparing the two approaches, the Court stated:

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.

Id. at 246-47, 96 S.Ct. at 2051 (footnote omitted).

After deciding the constitutional issue adversely to plaintiffs, the Court rejected plaintiffs' statutory arguments as

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[25] "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington* v. *Davis, supra,* 426 U.S. at 239, 96 S.Ct. at 2047, *citing Bolling* v. *Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). *See Fullilove* v. *Kreps,* 584 F.2d 600, 602 n.2 (2d Cir. 1978), *aff'd,* 441 U.S. 960, 99 S.Ct. 2403, 60 L.Ed.2d 1064 (1980), and cases cited therein.

well. Although the statutory section of the opinion, section III, is not free from ambiguity, we agree with Judge Carter that it does not govern the instant appeal. Viewing the "advisability" of a recruit training course as conceded, the Court termed it "apparent" that some minimal communicative skill would be "useful, if not essential, to satisfactory progress in the training regimen." *Id.* at 250, 96 S.Ct. at 2052. The Court concluded that it was a "sensible construction of the job-relatedness requirement" to hold "that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer." *Id.* at 250-51, 96 S.Ct. at 2052.

It is clear that although the parties and the lower courts had relied heavily on Title VII standards, Title VII was simply not applicable to the facts of *Washington* v. *Davis.* There is therefore good reason to think that the Court was not interpreting "job-relatedness" as defined by Title VII. Having stressed, in the paragraph quoted above, that the nature of a prima facie showing of discrimination under Title VII (*e.g.*, disproportionate impact) was irrelevant to the appeal before it, there was simply no reason for the Court to analyze the nature of the rebuttal contemplated by Title VII (*i. e.*, job-relatedness). The view that the Court was addressing solely the job-relatedness requirements of the Constitution, § 1981, and the D.C.Code rather than of Title VII is further supported by the lack of any discussion, in this portion of the opinion, of the language or legislative history of Title VII or of the testing guidelines promulgated by the EEOC. In our view it is most unlikely that the Court would have attempted to interpret a concept so central to the operation of Title VII without consulting the usual sources. Therefore we conclude, as Justice Stevens emphasized in his concurring opinion:

> there is no Title VII question in this case. The actual statutory holdings are limited to 42 U.S.C. § 1981 and § 1-320 of the District of Columbia Code, to which regulations of the Equal Employment Opportunity Commission have no direct application.

Id. at 255, 96 S.Ct. at 2055 (Stevens, J., concurring). *See Blake* v. *City of Los Angeles,* 595 F.2d 1367, 1378-82 and n.17 (9th Cir. 1979), *cert. denied,* 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980). ("If employers were permitted to validate selection devices without reference to job performance, then non-job-related selection devices could always be validated through the simple expedient of employing them at both the pre-training and training stage.") *See also the Uniform Guidelines,* 29 C.F.R. § 1607.14B(3) (1979), quoted in the margin.[26]

Even assuming that *Washington* v. *Davis* would govern the meaning of job-relatedness under Title VII, we think defendants misinterpret the intended scope of its holding. Dissenting from the Court's summary affirmance of *National Education Association* v. *South Carolina,* 434 U.S. 1026, 98 S.Ct. 756, 54 L.Ed.2d 775 (1978), Justice White, the author of the majority opinion in *Washington* v. *Davis,* rejected precisely the interpretation defendants urge upon us today.

> *Washington* v. *Davis,* 426 U.S. 229 [, 96 S.Ct. 2040, 48 L.Ed.2d 597] (1976), was thought by the District

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[26] Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. . . . Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

> Court to have warranted validating the test in terms of the applicant's training rather than against job requirements; but *Washington* v. *Davis,* in this respect, held only that the test there involved, which sought to ascertain whether the applicant had the minimum communication skills necessary to understand the offerings in a police training course, could be used to measure eligibility to enter that program. The case did not hold that a training course, the completion of which is required for employment, need not itself be validated in terms of job relatedness. Nor did it hold that a test that a job applicant must pass and that is designed to indicate his mastery of the materials or skills taught in the training course can be validated without reference to the job. Tests supposedly measuring an applicant's qualifications for employment, if they have differential racial impact, must bear some "manifest relationship to the employment in question," *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 [, 91 S.Ct. 849, 854, 28 L.Ed.2d 158] (1971), and it is insufficient for the employer "to demonstrate some rational basis for the challenged practices." *Washington* v. *Davis, supra,* 426 U.S. at 247 [, 96 S.Ct. at 2051].

Id. at 1027-28, 98 S.Ct. at 757.

It is important to keep in mind that in the instant appeal each plaintiff officer has been certified by the department to be both fully qualified to enter the police training program and fully qualified to join the force. Although the entry-level tests have in fact been demonstrated to disqualify disproportionate numbers of blacks and Hispanics, the black and Hispanic officers who brought this suit have all performed *at or above the level* set by the department itself. The *Guardians* plaintiffs do not challenge the establishment

of a particular passing grade and indeed it is not clear that they would have standing to do so. They challenge only the use of their passing scores to determine the order in which they were offered employment.[27] Therefore, the *Washington* v. *Davis* argument—that the entry-level tests were justified by the need to weed out those applicants who lacked the minimal skills necessary to successful completion of the training program—is simply not available to the defendants on this appeal.

III.

APPLICABILITY OF TITLE VII: THE DATE OF THE LAST DISCRIMINATORY ACT

Having established in the district court that the challenged examinations were indeed discriminatory within the meaning of Title VII, plaintiffs faced the task of demonstrating their entitlement to relief under the statute. This was no easy matter, for at every turn in the path between the injury and the remedy, defendants vigorously contested plaintiffs' right to proceed.

Two different questions of timing are crucial to plaintiffs' Title VII claim: to prevail thereon plaintiffs must demonstrate both that defendants violated the Act after its effective date and that plaintiffs filed a timely charge with the EEOC. *Acha* v. *Beame, supra,* 570 F.2d at 65. In order to establish each of these elements of their case, plaintiffs have attempted to show that defendants discriminated against them as late as October of 1974. Since Title VII

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[27] *See* Uniform Guidelines, 29 C.F.R. § 1607.5G. *See,* on rank order hiring issue, *Guardians Association* v. *Civil Service Commission, supra,* 630 F.2d 79 (2d Cir. 1980).

was made applicable to municipalities in 1972, any discriminatory hiring practices engaged in by defendants as late as October of 1974 would clearly constitute post-Act conduct. Furthermore, the EEOC charge filed May 23, 1975, was timely filed under § 706(e) as to any Title VII violation occurring within the previous 300 days, that is, on or after July 27, 1974.[28] Predictably, defendants urge in response that their discriminatory conduct, if any, ceased prior to 1972 and, therefore, that plaintiffs have failed to prove that defendants engaged in any post-Act discriminatory practices which were made the subject of a timely EEOC charge. We cannot agree.

The district court held that the department's reliance on eligibility lists reflecting performance on discriminatory examinations constituted a program of discriminatory hiring which terminated only when the last person was hired off the lists—that is, in October of 1974. Only then, in the court's view, did the department cease its unjustified refusals to hire minorities.[29] Defendants concede, as they

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[28] *See* note 7, *supra.*

[29] In assessing the timeliness of plaintiffs' efforts to seek relief for the injuries suffered as a result of defendants' hiring procedures, the district court appears to have implicitly determined (1) that placement on the eligibility lists alone governed date of hiring and (2) that the last hiring from challenged lists occurred in October of 1974. Defendants now challenge the accuracy of the first proposition and the relevance of the second. Conceding that the last class member was not hired until October of 1974, defendants contend in a rather conclusory manner that their discriminatory conduct ceased, at the latest, when the last members of the plaintiff class were *notified* that they were to be offered employment. This argument deserves only brief mention as it has not been properly preserved for appeal.

While claiming that this argument was raised below, defendants point only to the following excerpt from the memorandum of law they submitted to the district court on remand:

> There is no factual basis to support plaintiffs' contention that the hiring in September and October 1974 from the pre-1972

must, that as a general rule discriminatory refusals to hire are prohibited by Title VII.[30] *See Weise* v. *Syracuse University*,

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eligible lists resulted from lower placement on those lists because of relatively poor performance on the examination. In fact, all of the lists had been completely canvassed prior to December 15, 1973, and the deferral of appointments until after that time was a consequence of a variety of factors other than relative position on the list.

Whether the lists were in fact completely canvassed prior to December 15, 1973, and whether certain appointments were deferred until 1974 solely for reasons unrelated to rank on the discriminatory lists are questions of pure fact and our scope of review is therefore quite limited. Defendants have failed even to reveal at what point in the proceedings below, if ever, they went so far as to specify for Judge Carter the precise nature of these nonculpable factors, cryptically alluded to as a "variety." Nor have we been told what evidence, if any, was offered below to support the bold assertion that but for these alleged other factors, all members of the plaintiff class would have been hired by 1973, although any such evidence has presumably been in the possession of the department for seven years. Compare *Acha* v. *Beame*, 438 F.Supp. 70, 76 (S.D.N.Y.1977), *aff'd*, 570 F.2d 57 (2d Cir. 1978), another employment discrimination suit involving the NYPD in which the City defendants submitted "uncontradicted proof" that certain plaintiffs declined offers of employment.

Under the circumstances, we cannot fault Judge Carter for making no explicit finding on this point, nor we can overturn as clearly erroneous his implicit finding—that the refusals to hire were attributable to the discriminatory nature of defendants' employment practices rather than to independent and non-culpable factors.

[30] *See* § 703(a)(1), quoted in note 4, *supra*.

The fact that all members of the plaintiff class were eventually hired by the department does not mean, of course, that they cannot challenge the department's discriminatory refusal to hire them at an earlier date. There is no reason why the acceptance of a belated offer of employment should be deemed a waiver of the right to seek redress for a discriminatory delay. Although the practice complained of in the case at bar might perhaps more appropriately be designated "discriminatory delay in hiring," in our view the "refusal to hire" rubric is broad enough to include refusals followed by delayed acceptances.

Because the plaintiff class is composed exclusively of applicants who were ultimately, albeit belatedly, successful in obtaining employ-

522 F.2d 397, 409 (2d Cir. 1975). They contend however that the "operative" event in the hiring procedure under scrutiny, the relevant event for purposes of deciding when the unlawful discrimination occurred, was the *promulgation* of the eligibility lists reflecting the applicants' scores on the challenged exams. Defendants assert that since all the challenged examinations were administered and the corresponding lists were promulgated prior to the date Title VII became applicable to municipalities, the giving of the tests and the compilation of the eligibility lists are acts falling outside the scope of the statute. Defendants dismiss as a "fiction" the district court's view that the department's conceded *utilization* of these lists for purposes of making hiring decisions as late as 1974 in itself constituted a post-Act violation of Title VII. Defendants maintain that under Title VII the fact that, until they were exhausted, the lists determined the order in which all appointments were made constituted merely the non-actionable perpetuation of the effects of past, non-actionable discrimination.

A. *Refusal to Hire as a Violation of Title VII*

Defendants argue that "the claims of discriminatory refusal to hire presented here clearly depend upon 'a past event which has no present legal significance.' " Reply brief at 5, quoting *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 560, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). Defendants wish, understandably, to accentuate their pre-Act conduct and trivialize their post-Act conduct, but logic

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ment, we express no view on issues of concern only to those applicants who failed the challenged examinations and were never placed on an eligibility list. *See Gautam* v. *First National City Bank*, 425 F.Supp. 579 (S.D.N.Y.1976), *aff'd*, 573 F.2d 1290 (2d Cir. 1977), *cert. denied*, 440 U.S. 919, 99 S.Ct. 1241, 59 L.Ed.2d 470 (1979) (timeliness of EEOC filing in refusal to hire case).

and precedent preclude acceptance of defendants' assessment of the legal significance of their actions. We need not decide whether the giving of the tests and the compilation of the lists in themselves constituted the infliction of an actionable injury,[31] for the results of the tests were in effect being "used to discriminate," in direct contravention of § 703(h) of Title VII,[32] each time a member of the plaintiff class was denied a chance to fill a vacancy. By utilizing the tainted test results for years after becoming subject to the commands of Title VII, defendants continued a course of discriminatory conduct that had indeed begun before the effective date of the Act but did not cease until defendants abandoned the practice of making hiring decisions in this manner.[33] Even if the unjustified refusals to hire did not comprise the core of defendants' discriminatory conduct, at the very least they represented the culmination of a continuously maintained illegal employment policy. *Acha* v.

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[31] In support of their contention that the statute of limitations began to run, at the latest, upon the promulgation of the eligibility lists, defendants cite the companion cases of *Martin* v. *Ronan*, 44 N.Y.2d 374, 405 N.Y.S.2d 671, 376 N.E.2d 1316 (1978), and *Mundy* v. *Nassau County Civil Service Commission*, 44 N.Y.2d 352, 405 N.Y.S.2d 660, 661, 376 N.E.2d 1305, 1306 (1978). These decisions are inapposite. In these cases, the New York Court of Appeals was concerned solely with interpreting the four month statute of limitations governing proceedings against administrative bodies or officers under Article 78 of New York's Civil Practice Law and Rules. *See* C.P.L.R. § 217 (McKinney's). As Title VII was not at issue, the New York court had no occasion to decide whether a refusal to hire based on adherence to an eligibility list developed from the results of a discriminatory employment test is in itself a violation of Title VII that will set the statute of limitations running.

[32] *See* note 6, *supra*.

[33] The lists based on the 1968 to 1970 tests challenged in this action have been exhausted. We of course express no opinion as to the lawfulness of any hiring decisions made on the basis of subsequent tests and lists.

Beame, supra, 570 F.2d at 65. And it is settled law that the limitation period determining the timeliness of a complaint filed as to such a policy is measured from the last occurrence of an instance of that policy. *Id.*

Acha v. *Beame* provides a close and instructive parallel. In that action female police officers who, like the original *Guardians II* plaintiffs were laid off by the NYPD in 1975 sued under Title VII and various other federal laws, alleging that the last-hired, first-fired layoffs were discriminatory in light of the fact that women had been prevented from obtaining seniority because of the department's past discrimination in hiring. *Acha* v. *Beame,* 401 F.Supp. 816 (S.D.N.Y. 1975). The department's alleged discrimination against women stemmed not from the use of invalid examinations, as in the *Guardians* action, but rather from the maintenance of separate eligibility lists for male and female applicants and the imposition of a quota on the hiring of women. Despite this difference in the precise form of the alleged discrimination in hiring, in both *Guardians* and *Acha* the conduct complained of was the refusal, in the absence of any business justification, to hire in a timely manner members of the protected plaintiff group.

On remand,[34] the district court in *Acha,* taking into ac-

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[34] Deciding the first *Acha* appeal without the benefit of the Supreme Court's decision in *Teamsters* and demonstrating little prescience, we held:

> If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her *layoff* violates section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), since it is based on sexual discrimination.

Acha v. *Beame,* 531 F.2d 648, 654 (2d Cir. 1976) (emphasis added). On remand in *Acha,* the district court properly recognized that *Teamsters* had foreclosed this approach to the case. 438 F.Supp. 70, 76 (S.D.N.Y.), *aff'd,* 570 F.2d 57 (2d Cir. 1978).

count the Supreme Court's then recent decisions in *Teamsters* and *United Air Lines, Inc.* v. *Evans, supra,* stated:

> I find that with respect to hiring practices, the discriminatory act occurs when a male police office is hired instead of a female who meets all requirements for appointment and has a higher test score. Any class member who can demonstrate that such hirings occurred within the 300 days prior to [the filing of the EEOC charge] may succeed.
>
> * * * * * *
>
> [T]he *Teamsters* holding requires that the discrimination have taken place after the effective date of Title VII, which in the case of municipal employees is March 24, 1972. Pre-Act discrimination which is perpetuated by a neutral seniority system is immunized from Title VII attack by reason of section 703(h). . . . To fall outside the immunity afforded to a bona fide seniority system, plaintiffs must show more than the system's failure to correct pre-Act discrimination.
>
> Thus, the June 1975 layoffs pursuant to a facially neutral seniority system were immunized and cannot be the basis for a Title VII violation. Therefore, plaintiffs . . . to succeed must establish a prima facie case of a Title VII violation which occurred after the effective date of the Act and within the period of the statute of limitations. Thereafter, any class member who was not hired until after March 24, 1972 and, but for her sex would have been hired earlier than her actual appointment date, is entitled to a seniority revision.

438 F.Supp. 70, 75-77 (S.D.N.Y. 1977) (citations omitted).

On appeal after remand in *Acha*, this Court gave its approval to the district court's articulation of the plaintiffs' burden:

> To succeed at trial, then, the appellants would have to be able to demonstrate a Title VII violation occurring after the effective date of the Act, and within the period of the statute of limitations. Such a violation would occur if, absent discrimination, a woman would have been hired earlier than her actual date of appointment.

570 F.2d 57, 61 (2d Cir. 1978).

Acha makes clear that an unjustified refusal to hire is in itself a violation which cannot be dismissed as a mere effect of an earlier wrong. Defendants have advanced no persuasive basis for distinguishing *Acha*. In particular, their reliance on *United Air Lines, Inc.* v. *Evans* is doubly misplaced. First, as is obvious from our citation to the case in our *Acha* opinion, we were aware of the Supreme Court's holding in *Evans* and, of course, fashioned our decision accordingly. 570 F.2d at 60 n.4, 63-64. Second, *Evans* presented a fact situation entirely different from that presented in the instant case.[35] Nothing in *Evans* supports the

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[35] *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), concerned a flight attendant who was forced to resign in 1968 because of the airline's no-marriage policy. Evans was rehired in 1972, after the policy had been dropped, but United refused to credit her with seniority accrued during her earlier service. The Supreme Court held that United was entitled to treat the forced resignation as lawful after Evans failed to file a timely charge with the EEOC in 1968, explaining that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* at 558, 97 S.Ct. at 1889. Since the seniority system in itself was not discriminatory, the Court rejected Evans' contention that a continuing violation had been demonstrated. "[T]he emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Id.* (emphasis in original).

notion that a refusal to hire within the 300 day period preceding the filing of an EEOC charge may not properly be viewed as a current manifestation of a continuing violation.

Therefore, we hold that the district court properly rejected the view that the department's discriminatory refusals to hire were merely effects of earlier discriminatory conduct.[36] Furthermore, we hold that the district court properly declined to limit relief to those plaintiffs who were wrongfully refused employment within the critical 300 day period. *Guardians III*, 466 F.Supp. at 1279-80. These refusals were not discrete acts; they were carried out pursuant to a conceded and consistent policy. All plaintiffs injured by the department's post-Act adherence to that policy are therefore entitled to relief.

> A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of that policy. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 [, 95 S.Ct. 2415, 44 L.Ed.2d 679] . . . (1975); *Macklin* v. *Spector Freight Systems, Inc.*, [156 U.S.App.D.C. 69, 76-80], 478 F.2d 979, 986-90 (1973). See also 118 Cong.Rec. 7565 (March

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[36] Perhaps anticipating our determination that plaintiffs have demonstrated a continuing violation of Title VII as to which a timely charge was filed, defendants invoke the doctrine of laches with much feeling but little supporting authority. Fatal to this attempt is defendants' failure to allege or prove any prejudice in the defense of their case. *Compare Boone* v. *Mechanical Specialities Co.*, 609 F.2d 956 (9th Cir. 1979), *with Bernard* v. *Gulf Oil Co.*, 596 F.2d 1249, 1256 (5th Cir. 1979), *and EEOC* v. *Westinghouse Elec. Corp.*, 592 F.2d 484 (8th Cir. 1979). In fact defendants have been on official notice of the suspect nature of their hiring procedures at least since 1973, when we noted that the Rand Report had "confirmed plaintiffs' contention that the entry examinations had had a racially disproportionate impact." *Guardians II*, on appeal, 490 F.2d at 402.

6, 1972). Furthermore, where an illegal policy is so maintained, relief for injuries sustained even before the beginning of the limitations period is appropriate.

Acha v. *Beame, supra,* 570 F.2d at 65. *See Egelston* v. *State University College at Geneseo,* 535 F.2d 752 (2d Cir. 1976); *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515, 518-19, 523 (S.D.N.Y. 1973). *appeal dismissed,* 496 F.2d 1094 (2d Cir. 1974).

B. *Bona Fide Merit System*

Defendants contend that even if their refusals to hire would otherwise constitute violations of the Act, § 703(h) of Title VII protects them from liability for their post-Act utilization of the lists.[37] Section 703(h) immunizes from challenge the application by an employer of a bona fide seniority or merit system. Defendants view it as indisputable that the certification of candidates in rank order from an eligibility list for appointment in accordance with the Civil Service Law of New York State [38] constitutes the application of a "bona fide merit system" and that therefore, because of the § 703(h) exemption, the use of the lists cannot be declared an unlawful practice under Title VII.

It is by no means clear that the "merit system" language of § 703(h) applies to hiring practices. The first sentence

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[37] Conceding that they neglected to bring the "merit system" language of § 703(h) to the attention of the district court, defendants nevertheless urge us to consider their interpretation of § 703(h) for the light it sheds on a contention they did raise below, that is, that the department's rank order hiring scheme was a "neutral system" rather than a violation of Title VII. Because it would be empty exercise to attempt to judge the lawfulness of defendants' hiring procedures without considering all the pertinent sections of Title VII, we have addressed ourselves to this belatedly offered argument.

[38] *See* N.Y.Const. art. V, § 6; N.Y. Civil Service Law §§ 50, 56 and 61 (McKinney).

of § 703(h) is made up of two major clauses, the first, which we have italicized, dealing with bona fide seniority and merit systems, the second dealing with professionally developed ability tests.

> *Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin,* nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (emphasis added). In response to defendants' invocation of § 703(h) as immunizing use of a *hiring* list, plaintiffs contend that the term "merit system," like the companion term "seniority system," is generally understood to refer to a system whereby an employer rewards employees, pursuant to a regularized plan, for performance which has been superior in terms of length or quality. Plaintiffs also see significance in the use of the terms "seniority system" and "merit system" to refer solely to post-employment compensation practices in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1). *See Corning Glass Works* v. *Brennan*, 417 U.S. 188, 199, 94 S.Ct. 2223, 2230, 41 L.Ed.2d 1 (1974). Plaintiffs contend that de-

fendants have failed to uncover anything in either the wording of § 703(h) or its legislative history to suggest that Congress intended the phrase "seniority or merit system" to be understood, contrary to common usage and usage in prior legislation, to refer to pre-employment and hiring practices as well as post-employment practices. In addition, pointing out that § 703(a) of Title VII specifically identifies discriminatory refusal to hire as a prohibited practice *in addition* to discrimination in terms, conditions or privileges of employment, plaintiffs argue that the omission of any "refusal to hire" language in § 703(h) is indicative of the narrower scope of the latter section.

Although we do not minimize the appeal of plaintiffs' argument on this point, *but see Dickerson* v. *United States Steel Corp.*, 472 F.Supp. 1304, 1323-26 (E.D.Pa. 1978), we need not decide today whether the term "merit system" in § 703(h) encompasses hiring practices. Assuming for present purposes that it does, it is clear that a hiring system that ranks applicants acording to their performance on discriminatory examinations cannot claim the status of a "bona fide merit system" within the meaning of the statute.

Under the second, or "testing," clause of § 703(h), action based on the results of employment tests may not lawfully be "used to discriminate." At least since *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), it has been absolutely clear that testing practices are judged by their impact as well as their intent. Nevertheless, defendants contend that the practice of hiring on the basis of the results of pre-employment testing is a "bona fide merit system" which is protected by the first clause of § 703(h) regardless of impact, unless the system was purposefully *designed* to discriminate.

Under defendants' interpretation of § 703(h), any employer who administered a discriminatory entry-level ex-

amination before March of 1972 could lawfully base hiring decisions on the results of that examination *indefinitely*. As is urged in the instant case, an employer could, with impunity, refuse to hire in a timely manner hundreds of minority applicants, solely because of performance on an invalid test, years after Title VII explicitly forbade the *use* of testing results to discriminate in hiring. Read in such a fashion the first clause of § 703(h) would effectively break the promise held out in the second clause—the promise that as of the effective date of the Act, artificial barriers to the employment of minorities would be dismantled. Defendants hazard no guess as to why Congress would have taken such a Janus-like approach to the subject of testing.

Defendants contend that *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), requires us to read § 703(h) in this improbable manner. *Teamsters*, they argue, defined a bona fide seniority system as one not *designed* to be discriminatory. By analogy, defendants insist, a merit system not *designed* to be discriminatory must also pass muster as bona fide. In our view, this argument slides over a rather crucial distinction. There was no contention in *Teamsters* that the seniority system under scrutiny did not measure precisely what it purported to measure, that is, the length of time a given employee had been on the job. The measurement of length of employment was race-neutral: a white employee and a black employee hired on the same day would have the same seniority and the same attendant privileges and benefits. While such a system in a sense locked in the effects of past discrimination in hiring, the system itself was non-discriminatory.

Unlike the seniority system in *Teamsters*, the merit system in the instant case does not measure what it purports to

measure. The failing of the department's hiring system is therefore not that it perpetuates *the effects* of past discrimination, but rather that it perpetuates discrimination. It is one thing to utilize a system that locks in the effects of past discriminatory hiring decisions; it is a very different thing to lock in a discriminatory method of making hiring decisions. Once it has been determined that an examination has a disproportionate impact on minority groups and that it is not job-related, one cannot logically characterize a system of hiring solely on the basis of the results of the test as a "merit" system—for whatever the test does measure it does not have merit: it does not measure fitness for the job in question, which is surely the only logical meaning of the term "merit" in the hiring context. Section 703(h) makes sense only if the term "bona fide merit system" is understood to refer to merit in areas related to the necessities of the business, not "merit" in the abstract. Nothing in *Teamsters* implies that by labelling a non-job-related system of employee selection a "merit" system, an employer can avoid the command of Title VII that it henceforth select its workforce in a non-discriminatory fashion. Compare *California Brewers Association* v. *Bryant*, 444 U.S. 598, 100 S.Ct. 814, 821, 63 L.Ed.2d 55 (1980) (upholding seniority system):

> What has been said does not mean that § 703(h) is to be given a scope that risks swallowing up Title VII's otherwise broad prohibition of "practices, procedures and tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable con-

> tours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.

Therefore, again assuming arguendo that the merit system language of § 703(h) applies to pre-employment testing, we must agree with those courts that have applied the *Griggs* impact and job-relatedness standards to test the bona fides of a challenged "merit" hiring system. *See Dickerson* v. *United States Steel Corp., supra,* 472 F.Supp. at 1323-26; *League of United Latin American Citizens* v. *City of Santa Ana,* 410 F.Supp. 873, 910 n.28 (C.D.Cal.1976) ("Suffice it to say that a system which relies on discriminatory devices not based on a business necessity is not a 'bona fide' 'merit' system. . . . The Act does not give rights with one hand and take them away with the other.") *But cf. United States* v. *City of Chicago,* No. 73C 661 (N.D.Ill., Oct. 17, 1979) (where post-employment "merit system" promotion list developed from pre-Act test was challenged, burden on plaintiffs to show lack of job-relatedness). Defendants have cited no case in which § 703 has been held to immunize post-Act hiring on the basis of an eligibility list reflecting performance on pre-Act discriminatory examinations. In the absence of any guideposts pointing that way, we decline to blaze a trail in that direction.[39]

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[39] We have found nothing in the legislative history of § 703(h) that would support plaintiffs' interpretation. As the Supreme Court has noted, the section was added to the bill in response to fears that Title VII would destroy existing seniority rights. *Teamsters, supra,* 431 U.S. at 350-53, 97 S.Ct. at 1862-63; *Franks* v. *Bowman Transportation Co.,* 424 U.S. at 758-62, 96 S.Ct. 1251, 1261-63, 47 L.Ed.2d 444. During the debate preceding the adoption of § 703(h) Senators Clark and Case—the "bipartisan captains" responsible for Title VII—placed an interpretative memorandum in the Con-

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works . . . .

Culpepper v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

For the foregoing reasons we affirm Judge Carter's ruling on plaintiffs' Title VII claim.

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gressional Record dealing with the seniority issue. The memorandum stated that as it was, before the addition of § 703(h), Title VII would not affect established seniority rights. The final sentence of the memorandum read:

> However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.

110 Cong.Rec. 7213 (1964), quoted in *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 759 n.15, 96 S.Ct. at 1262 n.15. There is no indication in the subsequent history of the bill that § 703(h) was intended to be inconsistent with this understanding. Thus, although it is admittedly not conclusive one way or the other, in our view the legislative history of § 703(h) provides no support for defendants' interpretation.

IV.

TITLE VI

Because the particular types of relief granted under Title VII could not properly take into account any period of time prior to March 24, 1972, the effective date of Title VII as applied to municipalities, the district court turned to plaintiffs' Title VI claim in order to determine whether additional relief was available.[40] After ruling that there exists an implied private cause of action under Title VI,[41] Judge Carter held that like Title VII, Title VI prohibits not only intentionally discriminatory conduct but also practices and policies having "a disparate impact on minorities for which there is no countervailing justification." *Guardians III*, 466 F.Supp. at 1285.

Although we are unanimous in our determination that the district court's grant of relief under Title VI must be reversed, the three members of this panel have taken two different paths to that result. The remainder of section IV of this opinion represents only the view of the author. Judge Coffrin's concurring opinion, in which Judge Kelleher has joined, represents the opinion of the Court on the Title VI issue presented by this appeal.

Having determined that there was liability under Title VI, the district court turned to the question of relief:

> Since the substantive standard for illegal employment discrimination is the same under Title VI as it

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[40] Municipalities have been subject to Title VI since the effective date of the Civil Rights Act of 1964. The earliest of the examinations challenged in the instant action was administered in 1968. Hence, all the discriminatory conduct alleged in this action is post-Title VI.

[41] The pertinent provisions of Title VI are set out in notes 47 and 48, *infra*.

> is under Title VII, and all forms of traditional equitable relief are available under Title VI, it seems logical to adopt the body of remedial law already developed under Title VII. Similar kinds of remedies should apply unless they would conflict with some purpose peculiar to Title VI. . . . Although the statutory predicate has changed, there is no reason for the relief provided here to be any less comprehensive than that previously ordered in *Guardians II*.

Id. at 1287 (footnote omitted).

I must disagree. In my view, the compensatory remedies sought by and awarded to plaintiffs in the case at bar are not available to private litigants under Title VI. I therefore view it as unnecessary to decide today whether there is a private cause of action for other types of relief under Title VI and, if so, whether this action was timely brought.[42]

A. *The Nature of the Remedy*

In the recent case of *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), the Supreme Court made two points pertinent to the issue before us. First, the Court reemphasized that the

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[42] I regret that my colleagues have found it necessary to decide the difficult issue of the proper standard to be applied under Title VI—intent or impact—in a case where plaintiffs, in my view, are not entitled to the relief sought under either interpretation of the statute. Because of the ubiquitousness of federal funding, resolution of the intent vs. impact question will affect the rights and obligations of millions of applicants for and beneficiaries of a wide variety of federal programs. An issue of this magnitude merits resolution in a case where it is properly presented. For these reasons, I regard it as preferable to reverse on the narrower ground that the relief sought is not available under Title VI, whatever the proper standard, even though this remedial issue has not been addressed by either party on appeal.

existence of a private cause of action is not so much a question of wisdom as it is one of congressional intent, assuming for purposes of argument that the two may, on occasion, differ.

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. . . . While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, . . . what must ultimately be determined is whether Congress intended to create the private remedy asserted . . . .

Id. at 15, 100 S.Ct. at 245 (citations omitted).

Second, *Transamerica* illustrates that implication of a private right of action is not necessarily an all or nothing undertaking. The proper inquiry is two-fold: did Congress intend to create a private right of action and, if so, what were the intended limits on this private right of action. Thus in *Transamerica,* although recognizing a limited private remedy under the Investment Advisors Act of 1940 to void contracts made in violation of the statute, the Court held that the Act conferred no other private causes of action. Because *Transamerica* counsels us to consider not only the existence but the scope and nature of any private right of action that may have been created by Congress, it is necessary to focus on the remedies requested and awarded in this case before considering whether Congress intended to confer on private parties the right to bring this particular type of action under Title VI.

Much of the relief granted by the district court was intended to compensate plaintiffs for their being hired later than they would have been but for the defendants' discrimi-

natory practices. The district court expressly attempted to make plaintiffs whole, insofar as is possible, for past losses and injuries.[43] Toward this end, Judge Carter ordered as a first step that all class members be assigned constructive seniority dates, which were to be calculated pursuant to a formula spelled out by the court. With respect to the period during which they would have been employed had they been hired on their constructive seniority dates, plaintiffs were apparently to be awarded back pay,[44] with interest, and reimbursement for certain medical and insurance disbursements.

The parties have referred us to no case in which compensatory relief has been awarded under Title VI, nor has my own research disclosed any.[45] In fact, I have located

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[43] For lack of a better term, in this opinion I have used the phrase "compensatory relief" to describe those remedies, including money damages, the purpose of which is to make plaintiffs whole for injuries suffered in the past rather than to correct a present wrong or prevent a future one. Because the discrimination against plaintiffs alleged in this action ceased in 1974, I regard the awards of constructive seniority (with corresponding salary increases), back pay and back benefits to be retrospective and compensatory.

The district court's injunction provided for non-compensatory relief as well as compensatory relief. Thus, in addition to the above, the court ordered that a new sergeants examination be given to now-qualified officers who had been disqualified from taking earlier sergeants examinations due to their lack of seniority. Furthermore, "[i]n an effort to insure that future hiring practices are nondiscriminatory and valid," the defendants were ordered to meet and consult with plaintiffs, their counsel and their experts regarding the preparation and use of examinations to be given over the next two years. In my view, the district court's findings and conclusions in regard to plaintiffs' Title VII claim fully justified the award of this non-compensatory and prospective relief and we therefore need not decide today if such relief is similarly available in private suits under Title VI. Plaintiffs seek no additional relief on appeal.

[44] The intention of the district court with respect to back pay is not clear from the order entered below. *See* section VI of this opinion.

[45] In *Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976), employees and patrons of the defendant or-

only three cases that address the issue. In *Rendon* v. *Utah State Department of Employment Security Job Service,* 454 F.Supp. 534 (D.Utah 1978), the court held squarely that Title VI does not provide a plaintiff with a private cause of action for damages in an employment discrimination action, while noting in contrast that "in proper instances private parties can indeed maintain an action under Title VI in a role that could loosely but accurately be described as that of private attorneys general, *citing Lau* v. *Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), *inter alia.*

> The nature of such an action, however, differs markedly from the instant action. Here plaintiff is not attempting to directly enforce compliance with Title VI, nor is he seeking declaratory or injunctive relief. Rather, plaintiff is seeking compensation . . . for [an] alleged injury . . . .

Rendon v. *Utah State Department of Employment Security Job Service, supra,* 454 F.Supp. at 536.

In *Gilliam* v. *City of Omaha,* 388 F.Supp. 842 (D.Neb.), *aff'd,* 524 F.2d 1013 (8th Cir. 1975), the district court took a different view, expressing the opinion, in dictum, that a private action for damages might be maintained under Title VI. *Accord, Quiroz* v. *City of Santa Ana,* 18 FEP Cas. 1138 (C.D.Cal. Aug. 29, 1978) (dictum). In affirming

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ganization sued under the Fifth and Fourteenth Amendments, Title VI, and 42 U.S.C. §§ 1981, 1982 and 1983, alleging discrimination in employment and in delivery of services. Declaratory and injunctive relief was upheld on appeal but the district court's initial award of back pay, 372 F.Supp. 126 (N.D.Miss.1974), was vacated. On remand the district court again held that certain defendants would be liable for money damages, 424 F.Supp. 1242 (N.D.Miss.1976). Although the matter is not free from doubt, it appears from the various opinions in *Wade* that back pay was awarded under §§ 1981 and 1983 rather than under Title VI.

the district court's judgment for the defendants in *Gilliam*, on the ground that plaintiff had failed to prove the employment discrimination she had alleged, the Eighth Circuit did not discuss the question of remedies. In *Chambers* v. *Omaha Public School District*, 536 F.2d 222 (8th Cir. 1976), another employment discrimination suit brought under Title VI, *inter alia*, the action was barred by the applicable statutes of limitations. Noting that "[t]he issue of whether a monetary judgment can be obtained under Title VI has not been definitively resolved," the court expressed "no view on the propriety of permitting money judgments in § 2000d actions." *Id.* at 225 n.2.

It appears then that in the sixteen years since the passage of Title VI, those courts that have either assumed or held that a private action may be brought under the statute have uniformly granted only declaratory or injunctive relief aimed at bringing defendants into compliance with Title VI, in effect focusing on the correction of present wrongs and the prevention of future violations and as a practical matter leaving past injuries unredressed. *See, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (defendants ordered to admit plaintiff excluded from medical school under admissions system held violative of Title VI; compensation for wrongful delay of presumably lucrative practice not discussed and apparently not sought). In *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), a class suit against school officials in which non-English-speaking Chinese students sought relief from allegedly unequal educational opportunities, plaintiffs urged no specific remedy on the courts. Relying solely on Title VI, the Supreme Court reversed the denial of relief below, suggesting by implication that the appropriate relief would be prospective and corrective rather than compensatory:

> Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

Id. at 565, 94 S.Ct. at 787.

The approach has been the same in the courts of appeals. It appears that in all the circuits the relief granted in Title VI cases is generally aimed at bringing defendants into compliance with Title VI rather than compensating plaintiffs for past violations. *See, e.g., Uzzell* v. *Friday,* 591 F.2d 997 (4th Cir. 1979) (declaring invalid under Title VI certain race-related regulations at state college) (subsequently reargued and remanded by en banc court for fuller development of the record, *Uzzell* v. *Friday,* 625 F.2d 1117 (4th Cir. 1980)); *Serna* v. *Portales Municipal Schools,* 499 F.2d 1147 (10th Cir. 1974) (ordering school system to implement plan under which special needs of Spanish-surnamed students would be taken into account); *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir.), *cert. denied,* 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967) (ordering submission of desegregation plan by school board).

Although plaintiffs' inability to point to a precedent for the award of compensatory relief under Title VI is not dispositive, the apparently uniform approach of the courts over the many years since the passage of Title VI counsels us to scrutinize with particular care the claim that such relief is indeed contemplated by the statute.[46]

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[46] *Cf. Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), comparing § 10(b) of the Securities

B. *Implication of a Private Cause of Action for Compensatory Relief.*

As a preliminary matter, it should be noted that although private litigants have brought suit under Title VI on a number of occasions, the Supreme Court has not yet definitively declared whether any private cause of action under Title VI should be implied. The several opinions written in *Bakke* indicate that Chief Justice Burger and Justices Stevens, Stewart and Rehnquist would imply a private action under Title VI and that Justice White would not. Justices Powell, Marshall, Blackmun, and Brennan declined to address "this difficult issue," which had been neither argued nor decided in the courts below. *Cf. Burks* v. *Lasker*, 441 U.S. 471, 476 and n.5, 99 S.Ct. 1831, 1836 and n.5, 60 L.Ed.2d 404 (1979). I express no view on this issue today as the appeal before us can be decided on a narrower and more certain ground. I would hold only that Congress did not intend to create a private right of action for compensatory relief under Title VI.

In contrast to the cases decided thereunder, Title VI itself is short and to the point. Only two of its provisions are

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Exchange Act of 1934 with § 17(a). As to the former, Justice Rehnquist noted that the Supreme Court had, in implying a private cause of action, "simply explicitly acquiesced in the 25-year old acceptance by the lower federal courts of an implied action under § 10(b)." In contrast, the Justice stated, "[t]here is no similar history of longstanding lower court interpretation in this case. Indeed, only one other court in the 45-year history of the 1934 Act has held that a private cause of action for damages is available under § 17(a)." *Id.* at 577-78 n.19, 99 S.Ct. at 2490 n.19. *Cf. New York Telephone Company* v. *New York State Department of Labor*, 566 F.2d 388, 395 (2d Cir. 1977), *aff'd*, 440 U.S. 519, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979) ("A longstanding practice 'is not something to be lightly cast aside,'" *quoting Walz* v. *Tax Commission*, 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970).).

relevant to this appeal: § 601 forbids discrimination by recipients of federal funds,[47] and § 602 requires federal agencies that disburse funds to issue regulations insuring nondiscrimination by recipients and authorizes the agencies to terminate funding if efforts to secure compliance by voluntary means are unsuccessful.[48] On its face then, Title

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[47] Section 601 reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

[48] Section 602 reads:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to

VI provides for only one sanction against recipients of federal financial assistance who discriminate in the utilization of this money: termination of funding if and when efforts at voluntary compliance fail. Only the federal agencies providing the funds are expressly authorized to effect such a termination, and they may do so only after following the procedural steps spelled out in § 602.

In *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed. 146, the Supreme Court has reaffirmed that resort to the usual methods of statutory construction is appropriate in determining whether Congress intended to create a statutory cause of action. While the factors set forth in *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), may be relevant to the required analysis,[49] they are useful primarily insofar as they give us

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> grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1. Section 603 provides that agency action under § 602 is subject to judicial review, 42 U.S.C. § 2000d-2.

Section 604 limits agency action with respect to employment practices to situations where "a primary objective of the Federal financial assistance is to provide employment," 42 U.S.C. § 2000d-3. Defendants do not contest Judge Carter's finding that the federal financial assistance received by the NYPD fits this description.

[49] In *CETA Workers' Organizing Committee* v. *City of New York*, 617 F.2d 926, 931 (2d Cir. 1980), we recently summarized the four factors outlined in *Cort* v. *Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975):

insight into the determinative question of congressional intent. *CETA Workers' Organizing Committee* v. *City of New York*, 617 F.2d 926, 931-32 (2d Cir. 1980). But *cf. Cannon* v. *University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

It is undisputed that the plain language of Title VI hints at no private cause of action for compensatory relief, and I have found nothing in the legislative history to suggest that Congress intended the statute to mean more than it says.[50] The debates make clear that the overarching purpose

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> (1) whether the plaintiff was " 'one of the class for whose *especial* benefit the statute was enacted' "; (2) whether there was "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether implication of such a remedy was "consistent with the underlying purposes of the legislative scheme"; and (4) whether the cause of action was "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law."

In the instant case, even assuming in plaintiffs' favor that the answer to the first question is "yes" and the answer to the last is "no", my assessment of the second and third factors would preclude implication of a private cause of action for compensatory relief under Title VI.

[50] There are indications, in fact, to the contrary. Some legislators explicitly rejected the idea of a private right of action. Representative Gill, for example, stated:

> Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim.

110 Cong.Rec. 2467 (1964).

Senator Kuchel remarked, *id.* at 6562: "[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." Senator Keating agreed:

> Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which

of Title VI was "to make sure that funds of the United States are not used to support racial discrimination." 110 Cong. Rec. 6544 (Remarks of Senator Humphrey, floor manager of the bill).

> The history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities . . . .
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> This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964.[51] Representative Celler, the Chair-

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was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill.

Id. at 7065. *But see Cannon* v. *University of Chicago*, 441 U.S. 677, 713-16, 99 S.Ct. 1946, 1965-67, 60 L.Ed.2d 560 (1979).

[51] The President's message read in pertinent part:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also. . . .
>
> Many statutes providing Federal financial assistance, however, define with such precision both the Administrator's role and the conditions upon which specified amounts shall be

man of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination . . . . [See 110 Cong.Rec. 1519 (1964).[52]]

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given to designated recipients that the amount of administrative discretion remaining—which might be used to withhold funds if discrimination were not ended—is at best questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally—as is often proposed—the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites; for this may only penalize those who least deserve it without ending discrimination.

Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance—by way of grant, loan, contract, guaranty, insurance, or otherwise—to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein—but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practices.

109 Cong.Rec. 11161 (1963).

[52] Representative Celler subsequently remarked:

In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.

Bakke, supra, 438 U.S. at 328-30, 98 S.Ct. at 2768 (Opinion of Brennan, White, Marshall and Blackmun, *JJ.*) (footnotes added).

Although many of the lawmakers believed that discrimination in federally funded programs was already unlawful, they apparently viewed the new legislation as necessary in order to "eliminate uncertainty concerning the power of federal agencies to terminate financial assistance to programs engaging in racial discrimination in the face of various federal statutes which appeared to authorize grants to racially segregated institutions." *Bakke, supra,* 438 U.S. at 333, 98 S.Ct. at 2770 (opinion of Brennan, White, Marshall and Blackmun, *JJ.*), *citing* 110 Cong.Rec. 6544 (Remarks of Senator Humphrey). Thus, by enacting Title VI Congress strove "to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution." *Bakke,* 438 U.S. at 336, 98 S.Ct. at 2772 (Opinion of Brennan, White, Marshall and Blackmun, *JJ.*)[53]

I can find nothing in the language or the legislative history of Title VI to support the view that the legislation was in addition intended to compensate individuals who have been improperly excluded from the benefits of a program receiv-

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> It is for these reasons that we bring forth Title VI. The enactment of Title VI will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions.

110 Cong.Rec. 2467 (1964).

[53] I express no view on the substantive questions addressed in the various *Bakke* opinions, which I cite only for the light they shed on the availability of a private cause of action for compensatory relief under Title VI.

ing federal assistance. The language and the history of Title VII provide an instructive contrast. There the "make whole" purpose of the statute is evident from the legislators' remarks as well as the words of the statute itself. *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 419, 95 S.Ct. at 2372.

The next inquiry must be whether, despite the silence of both the statute and the legislative history, a private right of action for compensatory relief is so necessary to the fulfillment of the underlying purpose of Title VI that we must assume such a right to have been intended. As noted above the statute expressly sets forth in detail a mechanism for the enforcement of the proscription against discrimination in the use of federal money: administrative curtailment of funds. Section 602 provides, with great specificity, that termination may be effected only after attempts at voluntary compliance have failed, only after a hearing, and only after a report has been filed with the appropriate congressional committees and 30 days have elapsed.[54] A private cause of action for compensatory relief does not fit comfortably into this scheme. "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica, supra,* 444 U.S. at 19, 100 S.Ct. at 247. *See also CETA Workers', supra,* 617 F.2d at 933. Particularly is this so when the remedy implied may work at cross-purposes with the remedy expressed.

As § 602 makes evident, termination is the least-favored way to enforce the rule of non-discrimination—perhaps be-

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[54] Should an agency fail to carry out its responsibilities under § 602, relief is available. Under § 603, any person aggrieved may, in appropriate circumstances, obtain judicial review of agency action under Title VI. *See Board of Public Instruction of Taylor County* v. *Finch,* 414 F.2d 1068 (5th Cir. 1969); *Taylor* v. *Cohen,* 405 F.2d 277 (4th Cir. 1968) (timing of action); *Hardy* v. *Leonard,* 377 F.Supp. 831 (N.D.Cal.1974) (dismissed as moot); *see generally, Adams* v. *Richardson,* 480 F.2d 1159 (D.C.Cir.1973) (en banc).

cause it punishes innocent beneficiaries of federally funded programs as well as those who violate § 601. Of course, many of the programs made possible by federal money are created by Congress precisely to help minorities overcome the effects of past discrimination. Termination renders achievement of this goal impossible. Although terminated funds may be reallocated to another recipient, money may be wasted, time may be lost, and those in greatest need may be passed over. Therefore compliance is the preferred enforcement mechanism of Title VI. Compliance ensures both that the programs Congress has funded will not be disrupted *and* that they will be operated in a non-discriminatory fashion.[55]

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[55] *See Board of Public Instruction of Taylor County* v. *Finch, supra* note 54, citing remarks of Senator Pastore, 110 Cong.Rec. 7063 (1964):

> [T]he purpose of Title VI is not to cut off funds, but to end racial discrimination . . . As a general rule, cutoff of funds would not be consistent with the objective of the Federal assistance statutes if other effective means of ending discrimination are available.
>
> Section 602, by authorizing the agency to achieve compliance "by other means authorized by law," encourages agencies to find ways to end discrimination without refusing or terminating assistance.

414 F.2d at 1075 n.11.

The Supreme Court discussed the drawbacks of termination in *Cannon* v. *University of Chicago, supra* (implication of private cause of action under Title IX of the Education Amendments of 1972; injunctive relief granted as in *Bakke*):

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.
>
> The first purpose is generally served by the statutory pro-

One must consider the consequences, then, if private litigants seeking compensation are permitted to rush in where agencies fear to tread. One possible result would be a complete reassessment, by applicants for federal assistance, of the risks and benefits entailed in accepting federal funds. As things stand now, recipients face only two risks should they fail voluntarily to operate their programs in a discrimination-free manner—enforced compliance or termination of funding. There is no express provision in the statute for the recapture of funds that may have been spent in a non-complying manner and I know of no case in which an agency has attempted to force the return of funds given to a recipient during a period of non-compliance. *See Adams* v. *Richardson*, 356 F.Supp. 92, 100 (D.D.C.), *aff'd as modified*, 480 F.2d 1159, 1161 n.3 (D.C.Cir.1973) (en banc). If private actions for compensation are recognized, however, recipients would expose themselves to the addi-

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> cedure for the termination of federal financial support for institutions engaged in discriminatory practices. That remedy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred. In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded. Moreover, in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate.

441 U.S. at 704-705, 99 S.Ct. at 1961-62 (footnotes omitted).

As noted by Judge Coffrin, *infra*, the district court in *Cannon* held an action for money damages to be beyond the scope of Title IX. This determination was apparently not challenged on appeal, and therefore neither the Seventh Circuit nor the Supreme Court had occasion to address the issue of availability of such a remedy under the statute. *Cannon* v. *University of Chicago*, 406 F.Supp. 1257 (N.D.Ill.1976).

tional risk of having to respond in damages, after the federal funds have been spent, even though they lacked any intention to discriminate, as in the instant case, and even though they have never received agency notice of non-compliance or been given a chance to achieve compliance with the help of the agency responsible. If potential recipients who, given the chance, might have operated discrimination-free programs are dissuaded from participation, federal agencies will be significantly hampered in their ability to carry out programs which Congress itself has chosen to authorize and fund. *Cf. Loughran* v. *Flanders,* 470 F.Supp. 110, 115 (D.Conn.1979) (no private cause of action for damages under Education for Handicapped Children Act of 1975; implication of such a remedy would thwart purpose of legislation by deterring participation by potential recipients because of potential liability).

It is not my purpose to express any view on the advantages or disadvantages of such an approach to Title VI. It is enough to say that I regard it as extremely unlikely that Congress intended to create, by its silence, a private remedy which works at cross purposes with the remedy explicitly provided for by the statute.[56] Although it is true that

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[56] We agree with Judge Carter that the prospective declaratory and injunctive relief heretofore granted in private actions under Title VI may be less intrusive than the "draconian sanction of program termination," *Guardians III,* 466 F.2d at 1284. However, the present case illustrates that awards of *compensatory and retrospective relief* in such actions might have consequences far more crippling to the recipients of federal funds than termination. We regard it as highly improbable that Congress intended silently to arm private litigants with a weapon more devastating than that expressly created for the funding agencies themselves.

In light of my determination that Congress did not intend to create a private right of action for compensatory relief under Title VI, it is not necessary to consider the many troublesome questions that implication of such a remedy would pose. For example, it is not clear

"courts may provide private litigants exercising implied rights of action *whatever relief is consistent with the congressional purpose," Transamerica, supra,* 444 U.S. at 30, 100 S.Ct. at 252 (White, J., dissenting) (emphasis added), it is important that in our eagerness to carry out the will of Congress we do not engage in remedial overkill that will tend to frustrate rather than further the legislative intent.

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what causal relationship between the violation of § 601 and the alleged injury a plaintiff would be required to demonstrate. In the instant case we have been informed that the NYPD receives funds from the departments of Labor, Justice and Housing and Urban Development, but Judge Carter made no findings indicating what specific NYPD programs have been funded by these agencies. If no federal money goes for salaries or hiring, have plaintiffs made out a case? While plaintiffs have alleged that the NYPD discriminated against them in hiring, there is no allegation that any *federal program* was itself administered in a discriminatory fashion. Is such an allegation necessary? *See Coates* v. *Illinois State Board of Education,* 559 F.2d 445, 449 (7th Cir. 1977) (no private cause of action under Title VI where no allegation that specific actions under the federally funded program caused specific discriminatory effects); *McLeod* v. *College of Artesia,* 312 F.Supp. 498, 502 (D.N.M.1970) (no cause of action under Title VI; "no claim that the federal programs . . . have in any way been discriminatorily administered."). *See also Hupart* v. *Board of Higher Education,* 420 F.Supp. 1087, 1104 (S.D.N.Y. 1976) (no cause of action under Title VI where program to which plaintiffs were denied admission "was not funded by federal monies until after the discrimination had occurred."). *But cf. Flanagan* v. *President & Directors of Georgetown College,* 417 F.Supp. 377, 382-84 (D.D.C.1976).

Another question not addressed by the court below is the proper relationship between the amount of federal money received and the liability of the defendants. In the instant case Judge Carter made no finding as to how much federal money the NYPD had received during the years in question. It would be an extraordinary result, to say the least, if the department's liability exceeded the amount of the federal funds received, and yet no attempt was made below to limit the potential liability of defendants to the amount received by them, or more precisely, the amount spent by them in violation of § 601. *See generally Board of Public Instruction of Taylor County* v. *Finch, supra,* 414 F.2d 1068 (5th Cir. 1969) (limiting funding termination to particular program found to be in noncompliance).

While it may be tempting to back up the enforcement mechanisms selected by Congress with others of our own devising, this is not our proper role.

The Supreme Court has cautioned that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago, supra,* 441 U.S. 677, 99 S.Ct. at 1953, quoted in *Touche Ross, supra,* 442 U.S. at 568, 99 S.Ct. at 2485. "The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end." *Transamerica,* 444 U.S. at 24, 100 S.Ct. at 249. I would therefore consider Title VI no further.

V.

SECTION 1981

In issuing and subsequently reissuing the preliminary injunction now before us, Judge Carter specifically rejected plaintiffs' § 1981 claim:[57] in *Guardians II* he relied ex-

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[57] Judge Carter concluded, without discussion, that the same showing is required under § 1981 (and § 1983) as is required to make out a claim of discrimination under the Constitution. *Guardians II,* 431 F.Supp. at 534. Consequently, having found that plainiffs had failed to demonstrate discriminatory intent, the district court held that *Washington* v. *Davis, supra,* precluded relief under the Constitution, and by extension, under §§ 1981 and 1983. When plaintiffs' § 1981 claim was revived on remand, Judge Carter, noting that the issue was sub judice before the Supreme Court, declined to reconsider his earlier ruling. *Guardians III,* 466 F.Supp. 1276 n.4, *citing Davis* v. *County of Los Angeles,* 566 F.2d 1334 (9th Cir. 1977), *cert. granted,* 437 U.S. 903, 98 S.Ct. 3087, 57 L.Ed.2d 1132 (1978), subsequently *vacated as moot,* 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). *See* note 54 *supra.*

clusively on Title VII and in *Guardians III* he invoked only the combined authority of Title VII and Title VI. On appeal plaintiffs have urged, in the event we hold some portion of the relief granted to be unavailable under both Title VII and Title VI, that we consider § 1981 as an alternative basis for upholding the district court's order.[58] That eventuality has come to pass—our disposition of plaintiffs' Title VII and Title VI claims precludes the granting of relief for any period of time prior to March of 1972. We are therefore obliged to reach the as yet unsettled question of the applicability of § 1981 to cases where discriminatory impact, but not discriminatory intent, has been demonstrated.[59]

In describing this question as "unsettled," we are aware that it has been answered by this Court in the past. It is undisputed that before 1976, in employment discrimination cases brought under § 1981 *inter alia*, we did not require proof of purposeful discrimination.[60] *See, e. g., Kirkland* v.

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[58] The Equal Employment Opportunity Commission, as amicus curiae, has filed a brief addressed solely to the § 1981 issue. The Commission takes the position, as do plaintiffs, that § 1981 clearly prohibits both conduct having a discriminatory impact and intentionally discriminatory conduct. For purposes of discussion, all arguments advanced in support of this interpretation of the statute will be considered as plaintiffs' arguments, whether raised in plaintiffs' own brief or in that submitted by the EEOC.

[59] Plaintiffs do not challenge on appeal Judge Carter's determination that the evidence fell "far short" of establishing intentional discrimination on the part of defendants. This appraisal, which was based on Judge Carter's consideration of defendants' obligations under the New York State Constitution and the state's Civil Service Law and on an evaluation of evidence pertaining to minority recruitment efforts on the part of defendants, will therefore not be disturbed on appeal. *Guardians II*, 431 F.Supp. at 534-35.

[60] Two of these cases centered on the pre-1972 conduct of municipal defendants and Title VII was therefore unavailable to the plaintiffs. *See Bridgeport Guardians, Inc.* v. *Members of Bridgeport*

New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972). However, in *Washington* v. *Davis*, the Supreme Court subsequently pulled the legal rug out from under these decisions. Before *Washington* v. *Davis*, we had approached § 1981 with the belief that the Constitution itself prohibited conduct having a discriminatory impact as well as purposefully discriminatory conduct. Now that our constitutional premise has been declared erroneous, we must of course reconsider our statutory conclusion.

Section 1981 of Title 42 of the United States Code provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Although the Supreme Court has not yet decided the "exact applicability" of § 1981, *New York City Transit*

Civil Service Commission, 482 F.2d 1333, 1334 (2d Cir. 1973), *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972). In *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 423 n.1 (2d Cir. 1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), Title VII was apparently available but was not pleaded.

Authority v. *Beazer, supra,* 440 U.S. at 583-84 n.24, 99 S.Ct. at 1364 n.24, in the few years since *Washington* v. *Davis* was handed down a number of courts have addressed the issue.[61] Many adopting the interpretation urged upon us today by defendants, have held that discriminatory purpose must be pleaded and proven in actions brought under § 1981. *See, e. g., Crawford* v. *Western Electric Company, Inc.,* 614 F.2d 1300, 1309 (5th Cir. 1980); *Mescall* v. *Burrus,* 603 F.2d 1266 (7th Cir. 1979); *Grigsby* v. *North Mississippi Medical Center, Inc.,* 586 F.2d 457, 460-61 (5th Cir. 1978); *Williams* v. *DeKalb County,* 582 F.2d 2 (5th Cir. 1978); *Chicano Police Officer's Association* v. *Stover,* 552 F.2d 918 (10th Cir. 1977); *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service,* 488 F.Supp. 723 (D.N.J. 1980); *Harris* v. *White,* 479 F.Supp. 996, 1002 (D.Mass. 1979) (*citing Des Vergnes* v. *Seekonk Water Dis-*

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[61] Guidance from the Supreme Court regarding the correct interpretation of § 1981 has been eagerly awaited ever since *Washington* v. *Davis* took the lower courts by surprise in its definition of discrimination for *constitutional* purposes. Hopes for an early dispelling of the doubts engendered by *Washington* v. *Davis* were recently dashed when the high court vacated and remanded, on grounds of mootness, the case of *County of Los Angeles* v. *Davis,* 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). Certiorari had been granted to consider, *inter alia,* "whether the use of arbitrary employment criteria, racially exclusionary in operation, but not purposefully discriminatory, violates 42 U.S.C. § 1981 . . .." 440 U.S. at 627, 99 S.Ct. at 1381; 437 U.S. 903, 98 S.Ct. 3087, 57 L.Ed.2d 1132 (1978) The determination of mootness, of course, precluded consideration of this issue.

The Supreme Court's comments in *Beazer* and in the grant of certiorari in *County of Los Angeles* v. *Davis* support the view that although § 1981 was pleaded in *Washington* v. *Davis* the Supreme Court did not address or settle the question of whether proof of discriminatory intent is necessary in § 1981 actions. *See Davis* v. *County of Los Angeles, supra,* 566 F.2d at 1339; *id.* at 1347 (Wallace, *J.,* dissenting); *Mescall* v. *Burrus,* 603 F.2d 1266, 1270 (7th Cir. 1979); *Williams* v. *DeKalb County,* 577 F.2d 248, 257 n.5 (5th Cir.), *modified on rehearing,* 582 F.2d 2 (5th Cir. 1978).

trict, 601 F.2d 9, 15-16 (1st Cir. 1979)); *Ball* v. *Ridgeway Enterprises, Inc.*, 478 F.Supp. 456, 461 (S.D.Tex. 1979); *Louisville Black Police Officers Organization, Inc.* v. *City of Louisville*, 21 EPD ¶ 30,330 (W.D.Ky. Sept. 18, 1979); *Arnold* v. *Ballard*, 448 F.Supp. 1025 (N.D.Ohio 1978); *Lewis* v. *Bethlehem Steel Corp.*, 440 F.Supp. 949 (D.Md. 1977); *Johnson* v. *Hoffman*, 424 F.Supp. 490, 493-94 (E.D.Mo. 1977), *aff'd*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978); *Ortiz* v. *Bach*, 14 FEP Cas. 1019 (D.Colo. 1977); *see also Detroit Police Officers' Association* v. *Young*, 608 F.2d 671, 692 (6th Cir. 1979), *pet. for cert. filed*, 48 U.S.L.W. 3466 (U.S. 1980); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *City of Milwaukee* v. *Saxbe*, 546 F.2d 693, 705 (7th Cir. 1976) (equating § 1981 with constitutional standard in suit alleging discriminatory selective law enforcement); *Walker* v. *Robbins Hose Co.*, 465 F.Supp. 1023, 1044 (D.Del. 1979) (although unnecessary to decide issue because intentional discrimination found, view that § 1981 requires proof of racially discriminatory purpose "more persuasive."). *Accord, NAACP* v. *City of Corinth*, 83 F.R.D. 46, 62 (N.D. Miss. 1979); *Harris* v. *Anaconda Aluminum Co.*, 479 F. Supp. 11, 21 (N.D.Ga. 1979). *Also compare Dickerson* v. *United States Steel Corp.*, 472 F.Supp. 1304, 1316 (E.D. Pa. 1978), *and Croker* v. *Boeing Co. (Vertol Div.)*, 437 F.Supp. 1138, 1181 (E.D.Pa. 1977) (intent standard) *with Pennsylvania* v. *Local 542*, 469 F.Supp. 329 (E.D. Pa. 1978) (impact standard).

To date only a few courts have adopted the contrary view espoused by plaintiffs. *See, e. g., Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979); *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830

(D.C.Cir. 1977) (dictum);[62] *Dawson* v. *Pastrick*, 441 F.Supp. 133 (N.D.Ind. 1977), *rev'd, in part, on other grounds*, 600 F.2d 70 (7th Cir. 1979) (no discussion of impact of *Washington* v. *Davis* on § 1981 analysis). *Cf. Brown* v. *New Haven Civil Service Board*, 474 F.Supp. 1256, 1264 (D.Conn. 1979) (Newman, *J.*) (relief denied under § 1981 where plaintiffs failed to make out prima facie case of discriminatory impact under Title VII). Although *Davis* v. *County of Los Angeles* is the case most frequently cited for the proposition that discriminatory impact is sufficient, in our view *Davis* sheds very little light on the intended scope of § 1981. Without discussing the language or history of the statute the *Davis* majority simply announced that since § 1981 and Title VII both prohibit discrimination in employment and since similar remedies are available under the two statutes, the court would continue to interpret them to prohibit the same types of conduct until the Supreme Court explicitly directs otherwise.

> During recent history, every court which has considered the question has construed § 1981 to bar discrimination in employment. The courts consistently have employed Title VII principles as a benchmark not only in cases involving alleged discriminatory impact, but in other contexts as well. Indeed, the Supreme Court has recognized that Title VII and § 1981 embrace "parallel or overlapping remedies against discrimination." In the absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice.

566 F.2d at 1340 (citations omitted).

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[62] In *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838 n.22 (D.C.Cir.1977), a two-judge panel rejected, without discussion, the requirement of discriminatory purpose in § 1981 actions. It appears that full relief was available under Title VII.

Judge Wallace, writing in dissent, rejected the majority's analysis as inadequate.[63]

> That both statutes [Title VII and § 1981] can apply to the same facts and that both may afford similar remedies is beside the point. The same can be said of Title VII and the Fourteenth Amendment, yet, after *Washington* v. *Davis*, there remains an essential "operational distinction" between them. The proper inquiry is whether the legislative history of section 1981 indicates that it *should* track the Fourteenth Amendment's standards of proof rather than those of Title VII. I believe that the history of section 1981 strongly suggests precisely that.

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[63] Judge Wallace emphasized that he was addressing the § 1981 issue only to express his disagreement with the majority. Taking the position that the case could have and should have been decided solely under Title VII, the dissent characterized the majority's discussion of § 1981 as "wholly unnecessary" as well as "incorrect." 566 F.2d at 1347 (Wallace, *J.*, dissenting) (alluding to majority opinion, 566 F.2d at 1341 n.14.) Dissenting from the Supreme Court's subsequent vacatur of *Davis* on mootness grounds, Justice Stewart agreed, terming decision of the § 1981 issue "completely unnecessary." 440 U.S. at 635, 99 S.Ct. 1385 (Stewart, *J.*, dissenting). Justice Powell, although viewing the matter as "not free from doubt" and conceding that the basis of the Ninth Circuit's decision "is not clear," thought otherwise, concluding that "the decision of the Court of Appeals *seems* to have been based on a conclusion that independent violations of § 1981 had occurred." 440 U.S. at 640 n.5, 99 S.Ct. at 1388 n.5 (Powell, *J.*, dissenting) (emphasis added).

In discussing the frequently cited court of appeals opinion in *Davis* we express no view concerning its precedential weight, if any, within the Ninth Circuit, in view of the Supreme Court's subsequent vacatur of that decision on grounds of mootness, nor do we hazard a prediction as to that court's future stance on the § 1981 issue. *Compare County of Los Angeles* v. *Davis*, 440 U.S. at 634 n.6, 99 S.Ct. at 1384 n.6 *with id.* at 646 n.10, 99 S.Ct. at 1391 n.10 (Powell, *J.*, dissenting). *See Williams* v. *City and County of San Francisco*, 483 F.Supp. 335, 344 (N.D.Cal. 1979).

Id. at 1348. We agree that the proper inquiry must focus on the intent of Congress in passing § 1981. Furthermore, we do not believe that we may properly delay making this determination until such time as the Supreme Court speaks on this question.

Certainly nothing in the language of § 1981 supports the thesis that the statute was intended to prohibit facially neutral practices that can be shown to have a disproportionate racial impact despite the absence of any purpose to discriminate. In the instant case, for example, as long as the challenged lists were in the use, no applicant, regardless of race, could enter into an employment contract with defendants without achieving a grade of 75 or more on an entry-level examination, and for applicants of all races the order of hiring was determined by performance on these tests. Since the examinations were equally arbitrary and non-job-related as to applicants of all races, it would seem to be a distortion of the plain meaning of the statute to conclude that plaintiffs were denied the "same right to make contracts . . . as is enjoyed by white citizens." All applicants were in fact permitted to compete for employment on precisely the same terms.[64]

The structure of the statute supports this reading of its language. The "contracts" provision of § 1981 must, of course, be interpreted in the context of the statute as a

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[64] Compare the Supreme Court's treatment of the phrase "equal protection":

> [W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.

Washington v. *Davis, supra,* 426 U.S. at 245, 96 S.Ct. at 2050.

whole. We see three possible ways to approach § 1981: either (1) Congress understood the phrase "the same right . . . as is enjoyed by white citizens" to confer the right to challenge, on the ground of disproportionate impact, facially neutral practices bearing on any of the rights enumerated in § 1981, or (2) Congress intended equality to be understood in terms of purposeful discrimination as to some enumerated rights and in terms of disproportionate impact as to other rights specified in the same sentence, or (3) Congress understood "the same right . . . as is enjoyed by white citizens" to guarantee that as to each specified right, only conduct intended to discriminate on the basis of race would henceforth be unlawful. We regard the third choice as the least improbable construction. Nothing in the language or structure of § 1981 would justify singling out the right to contract for special treatment. On the other hand, plaintiffs have not suggested to us, nor is it immediately apparent, how the concept of disproportionate impact would give dimension to the notion of equality in regard to such rights as the right to sue, the right to be a party to a legal proceeding, or the right to give evidence.

The breadth of the term "contracts," even if we were to view it in isolation from the other rights specified, also militates against reading into this century-old statute modern concepts developed primarily in the specialized area of employment discrimination. While purposeful racial discrimination is something that can be understood and recognized in a variety of factual settings, the measurement of disproportionate racial impact and the definition of circumstances justifying a practice having such an impact are tasks that may vary greatly according to the type of contract under scrutiny. We consider it almost inconceivable that § 1981 was intended to outlaw in one stroke,

facially neutral practices bearing on the ability of persons to make contracts concerning sales, rentals, banking, public accommodations, private schooling, insurance, personal services, or anything else, where such practices have a disproportionate racial impact unjustified by some type of necessity.

The legislative history of § 1981 fails to convince us that the intent of the statute is more subtle than its language and structure would indicate. Section 1981 traces its origins back to the Civil Rights Act of 1866 and has ties with both the Thirteenth and Fourteenth Amendments to the Constitution. Its evolution has been traced and the significance of its history has been debated elsewhere and we will not burden this already lengthy opinion by repeating what we cannot improve upon. *See, e. g., McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); *Runyon* v. *McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *id.* at 192, 96 S.Ct. at 2605 (White, *J.*, dissenting); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (§ 1982 case shedding light on background of 1866 Act). It is sufficient to say that plaintiffs have been unable to cite and we have been unable to find *anything* in the legislative history to indicate that either the Thirty-Ninth Congress, which enacted the 1866 Act over a presidential veto, or the later congresses that subsequently re-enacted the provision understood the law to prohibit anything other than the racially motivated refusal to treat whites and nonwhites in the same, neutral manner.[65]

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[65] Similarly we can find no language in the Supreme Court's recent analyses of § 1981 and its companion provision § 1982, which also traces its history back to § 1 of the Civil Rights Act of 1866, to support plaintiffs' interpretation. *See Runyon* v. *McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (§ 1981), *Jones* v.

Objectively viewed, the language, structure and history of § 1981 all point to the conclusion that the statute was simply intended to prohibit purposeful racial discrimination in a wide variety of circumstances, including but not limited to employment discrimination. Nevertheless, plaintiffs argue that § 1981 should be interpreted to prohibit, in addition, facially neutral conduct with a discriminatory impact because to do so would render § 1981 "consistent with" Title VII. The two statutes differ in many ways. Title VII is concerned exclusively with employment discrimination; § 1981 is concerned with a wide variety of rights. Title VII is lengthy, detailed and sophisticated, reflecting a sensitivity to such modern realities and concepts as labor unions, professional employment testing and bona fide occupational qualifications; § 1981 is a short stroke painted with a broad brush. Title VII establishes an elaborate administrative enforcement mechanism and conditions the right to judicial relief on exhaustion thereof; § 1981 lacks even its own limitation period.

While § 1981 and Title VII certainly overlap to some degree and may complement one another in the area of employment discrimination, every indication suggests that they were not intended to reach precisely the same conduct. We

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Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (§ 1982). While the Court was of course addressing in these cases the very different question of whether the statutes were intended to reach private conduct, nothing in any of the several opinions written in these two cases even hints at the notion that the statutes were intended to reach other than intentional discrimination, whether by the state or by private parties. In fact, in *Jones* v. *Mayer Co.*, the Supreme Court concluded:

> Hence the structure of the 1866 Act, as well as its language, points to the conclusion . . . that § 1 was meant to prohibit *all* racially *motivated* deprivations of the rights enumerated in the statute . . . .

Id. at 426, 88 S.Ct. at 2196 (second emphasis added).

lack the power to reshape § 1981 in the mold of Title VII; only Congress can redraft an act of Congress. *See Davis* v. *County of Los Angeles, supra,* 566 F.2d at 1350 (Wallace, *J.*, dissenting); *Arnold* v. *Ballard, supra,* 448 F.Supp. at 1028; *Lewis* v. *Bethlehem Steel Corp., supra,* 440 F.Supp. at 965.

Our determination as to the intended scope of § 1981, as expressed in its language, structure and history, is dispositive. We merely note, and need not rely on, the fact that acceptance of plaintiffs' interpretation of § 1981 would lead to a troublesome anomoly: as one court has put it, if we accepted plaintiffs' view of § 1981, the Supreme Court's decision in *Washington* v. *Davis* would be rendered "meaningless," *Croker* v. *Boeing Co. (Vertol Div.), supra,* 437 F.Supp. at 1181.

> [B]ecause section 1981 can probably be invoked in a great many cases brought directly under the Fourteenth Amendment, the consequence of judicially creating a less demanding standard for section 1981 than for the Fourteenth Amendment might often be to circumvent the holding in *Washington* v. *Davis* altogether. In the vast array of cases such as the one before us now and *Washington* v. *Davis* itself, where Title VII does not apply but Section 1981 and the Fourteenth Amendment do, one could easily avoid the intent requirement of the Amendment by simply pleading section 1981.

Davis v. *County of Los Angeles, supra,* 566 F.2d at 1350 (Wallace, *J.*, dissenting) (footnote omitted). Furthermore, if proof of discriminatory intent is not required under § 1981, serious questions might be raised, under § 1981, about " 'a whole range of tax, welfare, public service, regulatory, and licensing statutes' " that pass muster under the

Fourteenth Amendment.[66] *Id.* at 1350-51, *quoting Washington* v. *Davis,* 426 U.S. at 248, 96 S.Ct. at 2051.

For the reasons discussed we affirm Judge Carter's rejection of plaintiffs' claim under § 1981.[67]

VI.

THE REMAND

For the foregoing reasons we vacate the order of the district court and remand the case for further proceedings in conformity with this opinion.

Specifically, today's decision requires that the district court award only such relief as is available to plaintiffs under Title VII. While the seniority, back pay and back benefit relief granted may therefore not take into account any period of time preceding the date Title VII became applicable to municipalities,[68] within that framework the district judge

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[66] As we recently remarked in another context, it is our duty as an inferior court not to "outflank the careful doctrinal barriers that the Supreme Court has constructed" by resort to "hairline distinctions." *Parent Association of Andrew Jackson High School* v. *Ambach,* 598 F.2d 705, 715 n.7 (2d Cir. 1979) (declining to reach under Thirteenth Amendment de facto school segregation not reachable under the Fourteenth).

[67] Our disposition of the intent vs. impact issue renders unnecessary any discussion of the timeliness of plaintiffs' § 1981 claim. We also need not address, and we therefore express no opinion on, the question of the applicability of § 1981 to charges of discrimination against Hispanics. *See McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); *Jones* v. *Alfred H. Mayer Co., supra,* 392 U.S. at 413, 88 S.Ct. at 2189; *Manzanares* v. *Safeway Stores, Inc.,* 593 F.2d 968 (10th Cir. 1979); *Ridgeway* v. *International Brotherhood of Electrical Workers,* 466 F.Supp. 595, 597 (N.D.Ill.1979).

[68] We need not and do not address the issue of the propriety of considering prior employment practices in fashioning prospective

may exercise broad discretion in fashioning a remedy. We therefore reject defendants' suggestion that it was an abuse of discretion for the district court to order defendants to consult with plaintiffs' counsel and plaintiffs' experts in drawing up new examinations for the immediate future. Indeed in *Guardians I* we encouraged precisely this type of cooperation:

> [W]e think the district court would have done well to direct that the municipal defendants should disclose the proposed examination to plaintiffs' counsel and expert, under an appropriate protective order, and afford them an opportunity to advance constructive criticisms, which the defendants should have carefully considered, without obligation to accept.

490 F.2d at 404. *See also Teamsters, supra,* 431 U.S. at 364, 97 S.Ct. at 1869. Further, we do not view it as an abuse of discretion under Title VII for the district court to order that a sergeants examination be given, within a reasonable period of time. Those who have been unable to take previous promotional examinations because of failure to meet the length of service requirement cannot be made whole unless they are given a chance to compete for advancement on the basis of their adjusted seniority dates. Defendants have not been ordered to grant more promotions than are called for by their staffing needs; they have in effect been ordered only to ensure that those promotions that are granted are granted on a non-discriminatory basis.

On remand the district court is directed to clarify its intentions regarding the award of back pay, if any; to clarify

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affirmative relief, as opposed to retrospective seniority adjustments or awards of back pay and back benefits. *Cf. Guardians Association* v. *Civil Service Commission, supra,* 630 F.2d 79 (2d Cir. 1980).

its rationale for taking the department's now defunct height requirement into account in determining the constructive seniority dates to be assigned to plaintiffs, *see* note 2, *supra;* and to clarify the plaintiff class to which its order applies, specifically, whether that class has been expanded beyond the revised limits announced by the court in *Guardians III*, 466 F.Supp. at 1278.

Finally, with a humility and an admiration born of our own lengthy struggle with this complex and difficult case, we request the district court to act as expeditiously as possible in reframing its remedial order so that both plaintiffs and defendants may finally turn their attention to their respective duties.

APPENDIX

CIVIC AWARENESS QUESTIONS

(from examination #0013, administered in 1970)

32. The New York Knickerbockers play their home basketball games at

    (A) The Coliseum

    (B) Lincoln Center

    (C) Madison Square Garden

    (D) Rockefeller Center.

33. When the 1970 Census is completed, the nation's largest cities are expected to show a decrease in population since 1960. The main reason for this is that

    (A) crowded conditions in cities have caused lower birth rates

(B) many middle-income families have moved from the cities to the suburbs

(C) fewer jobs have been available in the cities

(D) stricter welfare laws have driven the poor out of the cities.

36. Last summer, President Nixon announced some changes in the Office of Economic Opportunity. He did this in order to try to

(A) give every American a chance to participate as much as he can in American economic life

(B) reduce American buying of foreign products

(C) make more Americans eligible for home relief

(D) increase the power of all labor unions.

39. Of the following, the group that has *not* been on strike during the past 12 months is the

(A) Jersey City teachers

(B) N. Y. C. transit workers

(C) New York area letter carriers

(D) N. Y. C. gravediggers.

40. People have become concerned with man's future on earth because of the increasing amount of

(A) high rise apartment houses

(B) air and water pollution

(C) family planning

(D) wasteful farming.

Opinions of the Second Circuit

CODING

(from examination #9080, administered in 1969)

Code Letter	M	W	N	P	R	S	Z	E	F	K
Matching Number	1	2	3	4	5	6	7	8	9	0

In each question numbered 95 to 100, there are three pairs of code letters and numbers. In each pair, each code letter should have the same matching number it has in the Code Table.

In some of the pairs, one of the code letters may have a wrong matching number. Look at the 3 pairs of letters and numbers in each question carefully. If there is a wrong matching number in

only *one* of the pairs in the question, mark your answer A

just *two* of the pairs in the question, mark your answer B

all *three* of the pairs in the question, mark your answer C

none of the pairs in the question, mark your answer D.

Sample:	SMFKZ	61907
	ERPWM	88421
	NMKZW	31073

In the above sample, the first pair is right because each code letter has the same matching number it has in the Code Table. In the second pair, the matching number for the code letter R is wrong because it should be 5 instead of 8. In the third pair, the matching number for the last code letter W is wrong because it should be 2 instead of 3. Since there is a wrong matching number in just two of the pairs, the answer to the sample is (B).

95. MNRZKERRP—135708554
WNPSREFNM—234658931
PENZMENRW—483718352

96. KFEZSPRNW—099764532
WPSMFKNNM—246190333
PSRRPSRPN—465556543

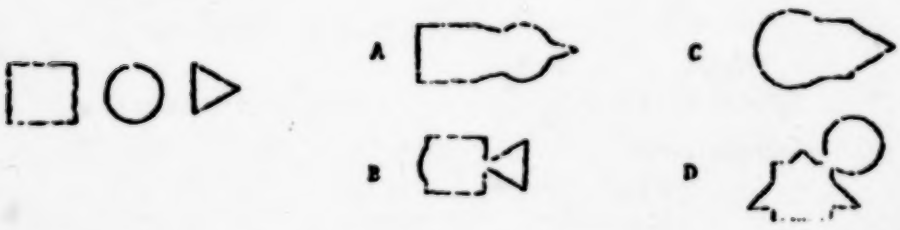
* * * * * *

SPACE RELATIONS

(from examination #9080, administered in 1969)

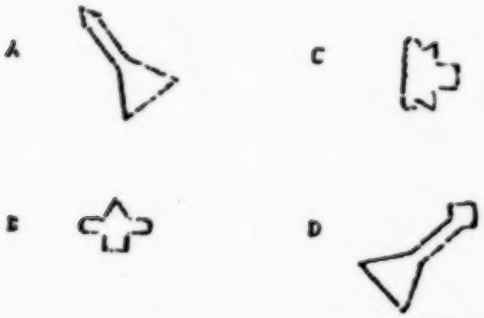
Each question from 89 to 94 consists of three figures of different sizes and shapes. Pick as your answer that lettered choice which can be obtained by placing all three figures on top of, or next to, one another.

SAMPLE:

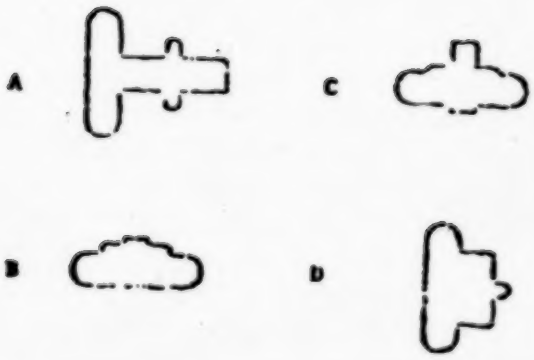


In the example above, the only lettered choice that can be obtained by placing the three figures on top of, or next to, each other is choice (B) because the triangle, square, and circle, although in different positions, are the same size as they were before.

89.



90.



KELLEHER, District Judge, concurring:

I concur in the results set forth in Judge Meskill's opinion and in the reasons therein set forth, except that I join Judge Coffrin insofar as he finds the absence of discriminatory intent as the proper basis on which to reverse as to the relief granted under Title VI.

In regard to the relief ultimately to be awarded, the district court is presented with the requirement under the law that a delicate balance be struck of a sort not common to the majority of employment discrimination claims awarded under Title VII. It would apear inappropriate for this court to direct the district court, as a matter of law, to require wholesale reshuffling of the seniority lists from which future appointments must be made. As an equitable remedy, any such reshuffling must take into account the duly-aquired seniority status of those presently situated thereon. I concur in the remedy which will require new examinations for promotion to be held and that the length-of-service requirement for eligibility to take such examination may properly be modified to compensate for past discrimination. It may be that the remedy of damages and the propriety thereof is to be placed on the equitable scale in measuring the kind and character of compensation for past discrimination.

In this connection, the Court below should consider *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), which discusses in detail the issues which surround the award of retroactive seniority to plaintiffs asserting a claim under Title VII. In *Franks*, the Court—in ruling that an award of retroactive seniority was appropriate under the circumstances of the case at hand—observed that:

> ". . . [T]he burden of the past discrimination in hiring is with respect to competitive status benefits divided among the discriminatee and nondiscriminatee employees under the form of relief sought. The dissent criticizes the Court's result as not sufficiently cognizant that it will 'directly implicate the rights and expectations of perfectly innocent employees.' [citation omitted] We are of the view, however, that the result which we reach today [in awarding retroactive seniority to discriminatee employees]—which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.' [citation and footnotes omitted]"
>
> 424 U.S. at 777-778, 96 S.Ct. at 1270-1271.

However, the *Franks* court thereafter qualified its position by noting that the tool of retroactive seniority could be inappropriate in certain circumstances:

> "In holding that class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under § 706(g), we do not in any way modify our previously expressed view that the *statutory scheme of Title VII 'implicitly recognizes that there may be cases calling for one remedy but not another,* and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts.' [citation

omitted] *Circumstances peculiar to the individual case may, of course, justify the modification or withholding of seniority relief for reasons that would not if applied generally undermine the purposes of Title VII.*[41]

[footnote 41: "Accordingly, to no 'significant extent' do we '[strip] the district courts of [their] equity powers.' *Post,* at 1274. Rather our holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the *basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.*" * * *]
424 U.S. at 779, 96 S.Ct. at 1271 [emphasis added].

The Court below on remand may properly find that just such an exceptional circumstance exists here. Although, as the *Franks* Court noted, claims brought pursuant to Title VII regarding employment in private enterprise serve to vindicate a national policy against racial discrimination in employment, the case at hand differs from the typical private sector employment discrimination action in that another facet of the public interest is involved—one which must be given substantial weight. Vindication of the public's paramount interest in the protection of its security demands that the police department be an effective, experienced, efficient, functional instrumentality, the high morale of which must be regarded as a correspondingly paramount interest. To displace officers from a seniority status duly acquired after years of arduous work and physical risk would inevitably

undermine the morale of the police department to a very substantial degree. As a result, the department could be deprived of the wisdom born of the experience of those in its leadership positions.

The law is not *required* to disregard the effects of a retroactive award of competitive status seniority; indeed, in an employment activity such as this, where the public safety and welfare are so closely intertwined with the private rights of plaintiffs which are at stake, the equitable conscience of the district court must be greatly concerned with the broader impact of its chosen remedy upon all of the citizens of New York City—not just upon plaintiff class members. In the private enterprise context, any harm to an employer which may arise from a judicially-imposed remedy for past discrimination is limited to impairment of that employer's profit-making capacity. Here, any impairment in the smooth operation of the police department would result in harm enveloping an infinitely broader group than merely the employer: such impairment diminishes the protections afforded by the police to the public at large. Therefore, it is inconceivable that, in adopting Section § 706(g) of Title VII, Congress was not necessarily cognizant of instances such as this where the interests at stake transcend the immediate rights of the employer and employees involved.

Accordingly, it would seem that the following approach should be taken upon remand. The issue of liability has been determined in favor of plaintiffs, giving rise to an entitlement on their behalf to relief. In addition to the remedy of money damages as recompense for past deprivations, with regard to the future the relief to be granted shall be that which emerges from the sound discretion of the district court in the exercise of its equitable powers. In exercising such powers, the district court should take into account

all the circumstances of this case—taking new evidence, if necessary—to determine the extent to which the balance of equities requires the non-destruction of the present seniority system, as such system affects the morale and functional competence of the police department in vindicating the public's interest in security.

COFFRIN, District Judge (concurring):

I join Judge Meskill's opinion in all respects except that I would reverse on the Title VI issue for different reasons. I disagree with his conclusions that Title VI does not permit a private action for compensatory relief and that the issue may be resolved on that ground alone. I would reverse as to the relief ordered below pursuant to Title VI because, as the district court found, there is no evidence of discriminatory intent in this case.

In reaching his conclusion concerning the availability of private actions under Title VI Judge Meskill relies upon *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). That decision holds that the necessarily implicit private right to an equitable remedy of rescission under section 215 of the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21, is exclusive and no private right to a legal remedy for damages exists under section 206 of that Act. The Supreme Court reached this conclusion by a careful analysis of the statutory scheme and its language and found in section 215 an express intent that certain contracts be void. They reasoned therefrom that the customary legal remedies for voidness, including rescission, must be available to the contracting parties. By contrast section 206 merely declares certain conduct to be unlawful without thereby necessarily creating a private cause of action for damages.

Transamerica does provide ample authority for the proposition that a statutory scheme may distinguish and limit the remedies available in an implied private right of action. In the instant case, however, a true distinction between types of relief is not drawn by Judge Meskill. Rather, without finding that noncompensatory relief is available privately under Title VI, he simply would hold that compensatory relief is not. To the extent that a distinction may be inferred from this approach Judge Meskill does not find it in the language of Title VI but rather in the treatment of that Title by the federal judiciary, despite his stated purpose of discerning the intent of Congress as the Supreme Court did in *Transamerica*. Regardless of the approach I do not believe this case demands an attempt to distinguish between the remedies available under Title VI as the language of the Investment Advisors Act demanded the Supreme Court's distinction in *Transamerica*.

Section 601 of the Civil Rights Act, unlike section 206 of the Investment Advisors Act and contrary to Judge Meskill's characterization, is not cast in the prohibitory language of a penal statute. It does not forbid discrimination by recipients of federal funds, it provides simply that persons shall not be excluded from the benefit of those funds because of race, color or national origin. Its language is not directed to a violator's conduct, it is directed to the victims' rights. Section 602, moreover, does not provide such victims a remedy of any sort, even indirectly.[1] It provides the executive branch with an enforcement mechanism and sanction power the existence of which would be questionable in the absence of express language. *NAACP* v.

[1] It would seem to go without saying that one does not remedy a deprivation by terminating entirely the source of the benefit deprived. This is the only "remedy" Judge Meskill identifies.

Medical Center, Inc., 599 F.2d 1247, 1255 (3d Cir. 1979). The Title VI language does not compel Judge Meskill's distinction between kinds of remedies. If section 601 does not imply a private right to compensatory relief it would be because it implies no private right to any type of remedy rather than because it requires distinct treatment of compensatory relief.

In contrast to its treatment of the Mortgage Advisors Act in *Transamerica*, the Supreme Court has examined Title VI without even hinting that private rights of action thereunder would depend for their existence on distinctions among the remedies sought. In *Cannon* v. *University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Court analyzed Title IX of the Education Amendments of 1972 by comparing it with the virtually identical language of Title VI of the Civil Rights Act. The unmistakable import of the finding of a private right of action unlimited as to remedy under Title IX is that the same conclusion would be reached if the issue of the existence of a private right under Title VI were presented. Significantly the Court did not distinguish among the kinds of remedies sought or available under Title IX, saying simply that "petitioner may maintain her lawsuit." *Id.* at 717, 99 S.Ct. at 1968. The petitioner's action sought declaratory, injunctive and monetary relief in the district court; that court indicated in its Opinion that monetary relief would be inappropriate. *Cannon* v. *University of Chicago*, 406 F.Supp. 1257, 1259 (N.D.Ill. 1976). The Seventh Circuit affirmed without comment on the district court's distinction among the remedies sought. *Cannon* v. *University of Chicago*, 559 F.2d 1063 (7th Cir. 1976).

I am persuaded by *Cannon* and *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733,

57 L.Ed.2d 750 (1978), that a private right of action exists under Title VI irrespective of the compensatory effect of the relief sought or granted. *Transamerica* concerns a statute wholly different from Title VI in content and philosophical purpose, and the distinction it draws among privately available remedies along legal and equitable lines simply does not support Judge Meskill's distinction in the present case along compensatory and noncompensatory lines; *Transamerica* fails to persuade me as it does him.

The foregoing leads me to disagree with Judge Meskill's legal conclusion about the privately available remedies under Title VI. In addition I am unconvinced that that conclusion, if correct as a matter of law, disposes entirely of the Title VI issues this case presents. Judge Meskill would hold that compensatory relief is not privately available under Title VI, but he does not specify the details of Judge Carter's ten page Order that this holding would affect. He concedes in footnote 43 that the Order includes noncompensatory elements and observes that two of these elements are incidentally available to the entire class under Title VII, making the issue of their availability under Title VI unnecessary to decide. His analysis, however, fails to consider the noncompensatory relief in Judge Carter's Order that may not incidentally benefit the entire class under Title VII. Judge Meskill apparently would leave to the district court on remand the task of sorting through the Order and determining the disposition of its elements according to their compensatory character. Because reasonable minds might disagree on the characterization of given elements of the Order,[2] it is conceivable if not inevitable that the district

[2] Although Judge Meskill apparently would characterize constructive seniority as compensatory relief, text accompanying notes 43 & 44 *supra*, this remedy seems to meet Judge Meskill's definition of non-

court on remand will identify elements as to the disposition of which the court would have been given no guidance. Moreover, Judge Meskill's approach apparently would open the door to needless litigation and appeal in this case and others of questions about the compensatory character of particular remedies.[3]

Nowithstanding my difficulties with Judge Meskill's approach, I concur in his reversal of the Title VI component of Judge Carter's Order because, as stated earlier, I believe Title VI requires proof of discriminatory intent. Inasmuch as the evidence in this case supports only a finding of discriminatory impact I too would reverse.

Judge Carter's holding that the substantive standard for illegal employment discrimination under Title VI is the "impact" standard of Title VII rather than the "intent" standard of the Constitution, *Guardians Association* v. *Civil Service Commission*, 466 F.Supp. 1273, 1287 (S.D.N.Y. 1979), appears to be contradicted by *Bakke*. Justice Powell concluded that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke*, 438 U.S. at 287, 98 S.Ct. at 2747. Justices Brennan, White, Marshall and Blackmun agreed with that assessment in unequivocal language. *Id.* at 325, 328, 98 S.Ct. at 2768. Justice Brennan, speaking for himself and the other three Justices stated: "In our view, Title VI prohibits only those

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compensatory relief, note 43 *supra*, because it corrects a present wrong. This court should not view such a remedy as retrospective compensation for past harm simply because the judicial process takes time.

[3] It seems almost inevitable that whatever the district court would do on remand would return to this court on appeal—the issue being whether the district court correctly identified the compensatory and therefore unavailable remedies granted under Title VI.

uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies." *Id.* at 328, 98 S.Ct. at 2768. A majority of the Court thus seems to take the position that conduct is not actionable under Title VI unless it is actionable under the Constitution, which under its current construction imposes an "intent" standard. *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Although *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), may be read for the contrary proposition, as indeed Judge Carter read it, *Guardians*, 466 F.Supp. at 1285, *Bakke* appears to undercut *Lau's* currency.

> We recognize that *Lau* . . . may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion . . . that Title VI's standard . . . is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

Bakke, 438 U.S. at 352, 98 S.Ct. at 2780 (Brennan, J., White, Marshall and Blackmun, JJ., concurring).

Such a construction of Title VI leads to the unhappy anomaly that there would be a more stringent standard for proving illegal discrimination by employers utilizing federal funds than there would be for nonfederally-funded employers under Title VII. Nevertheless the language of *Bakke* seems to compel this result.[4]

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[4] Although I reach this conclusion I am aware of a possible analysis that employs *Lau* and arrives at a different result. Since *Lau* is based on a specific HEW regulation rather than the general language of Title VI, *Lau* may be read for the proposition that Title VI permits agencies that administer Title VI funds to impose an impact standard

Judge Carter found that there was no intentional discrimination in this case, *Guardians*, 466 F.Supp. at 1275, which leads to the conclusion that, under the analysis outlined above, appellants' conduct is not actionable under Title VI. It is for this reason that I would reverse.

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in their regulations although Title VI does not itself require such a standard. *See Lau*, 414 U.S. at 569, 94 S.Ct. at 789; *id.* at 571, 94 S.Ct. at 790 (Stewart, J., concurring). *Board of Education* v. *Califano*, 584 F.2d 576 (2d Cir. 1978) approved such an analysis, *id.* at 588-89 & n. 38, and a different panel of this court later observed that *Bakke* did not expressly overrule *Lau*. *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 716 (2d Cir. 1979); *accord*, *Lora* v. *Board of Education*, 623 F.2d 248 at 252 (1980) (Oakes, J., concurring). This analysis, however, fails to convince me that we should affirm Judge Carter on the Title VI issue.

Judgment of Court of Appeals Dated July 25, 1980 Vacating Order of District Court and Remanding

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-7377

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of July one thousand nine hundred and eighty.

Present:

HON. THOMAS J. MESKILL, C.J.
HON. ROBERT J. KELLEHER, D.J.
HON. ALBERT W. COFFRIN, D.J.

Circuit Judges,

THE GUARDIAN ASSN. OF NEW YORK CITY POLICE DEPT., INC., ET ANO.

Plaintiff-Appellees

v.

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, ET ANO.

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of

record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is vacated and the action be and it hereby is remanded to said district court for further proceeding's in accordance with the opinion of this court.

A. DANIEL FUSARO, CLERK

/S/ ARTHUR HELLER
BY: Arthur Heller, Deputy Clerk

Order of Court of Appeals Denying Petitions for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-7377

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of June, one thousand nine hundred and eighty-one.

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS; Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALPHONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York Police Department,

Defendants-Appellants.

Order Denying Rehearing

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, The Guardians Association of the New York City Police Department, Inc., et al., and counsel for the defendants-appellants, Civil Service Commission of the City of New York, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED, Judge Robert J. Kelleher dissenting.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro,
Clerk.

Order of District Court (Carter, J.)
Dated May 14, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action 76
Civ. 1982 (RLC)

FILED
MAY 15 1979

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., *et al.*,

Plaintiffs,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Defendants.

WHEREAS, a hearing on plaintiffs' motion for a preliminary injunction having been had and the Court having made findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 (a) in opinions dated March 17, 1977 and February 27, 1979 holding that the hiring and employment practices of the defendants violated Title VI and Title VII of the Civil Rights Act of 1964; and,

WHEREAS, the Court has defined the plaintiff class to consist of all those Black and Hispanic New York City police officers whose seniority is lower than it would otherwise be but for the discriminatory practices of defendants,

IT IS ORDERED THAT:

1. All members of the class shall be given constructive seniority dates which shall be the earlier of the following:

(a) the candidate's actual seniority date; or

(b) the median date of appointment of those who achieved the median score on the earliest examination which the class member took, hereafter referred to as the "median appointment date".

2. Class members discriminated against by the height requirement shall be given a constructive seniority date which shall be the earliest of the following:

(a) the date upon which they would have been appointed but for the discrimination caused by the existence of the height requirement at the time of the first examination they took; or

(b) the median date of appointment as determined by the median score of the earlier examination they would have taken but for the height requirement; or

(c) the date they would be given pursuant to the reordering set forth in 1(a) and (b) above.

3. The constructive seniority dates for members of the plaintiff class having been determined and awarded in accordance with paragraphs 1 and 2 above, class members, who are not currently employed by the New York City Police Department (NYPD), shall be afforded the opportunity to return to employment as police officers in the NYPD with said seniority date. Those that return, as well as those class members currently working as police officers, will be appropriately assigned to the positions on the city, state and federal budgets and to the job position at the salary and benefit scale which their respective seniority warrants.

4. All class members may be awarded back pay and all other benefits or monetary equivalents thereof plus interest

calculated from their constructive seniority date until receipt of all monetary entitlements which they would have received had they been appointed on their constructive seniority date.

A) In determining back pay each class member may receive the following: the difference between the average income earned by police officers who were appointed on the constructive seniority date of each class member and the income and unemployment benefits the class member has earned from his or her constructive seniority date until he or she has received the salary and other benefits which his or her constructive seniority warrants.

B) In determining medical and insurance benefits to which the class members would have been entitled, but for the defendants' wrongful discrimination, the class members shall receive the sum of all medical disbursements and medical and all other insurance payments made by class members during the period they would have been employed by the NYPD, but for the defendants' wrongful discrimination, to the extent such payments would have been made by the defendants or their insurers.

5. A) Within 30 days of the entry of this order, the defendants shall review documents which reflect the names and scores of all persons who took the following examinations: 7065
8046
8108
9019
9049
9080
9086
0013

B) Defendants shall, within the 30 day period, provide plaintiffs' counsel with a document reflecting the following: the names of all Black and Hispanic officers who were appointed after 1968 and took one or more of the exams listed in paragraph 5A, their actual appointment date, the first police officer examination they took, their birthdate, their veteran status, their date of recall and their last known address. Upon request, defendants shall provide plaintiffs' counsel with access to the data they utilized in making these and all other determinations pursuant to this order.

C) Defendants shall also within the 30 day period, provide plaintiffs with the period of layoff and first date of recall of the officers with the median appointment dates from the examinations covered by this order and the same information for officers with appointment dates 30 and 60 months prior to the median appointment dates.

D) Within 60 days from the entry of this order, defendants shall provide plaintiffs with the average salary and average monetary expenditures for medical and insurance benefits for officers described in 5C for each year from their date of hire to the present. Defendants shall provide plaintiffs with the income and overtime records of class members during the period they were employed by the NYPD.

6. A) Within 10 days of plaintiffs' receipt of the information described in paragraphs 5B and C above, the plaintiffs shall draft and send letters to all Black and Hispanic police officers who took one of the aforementioned examinations. There shall be four letters sent: one to Black and Hispanic officers whose constructive seniority is not earlier in time than their actual appointment date, one to Black and Hispanic officers whose constructive seniority

date is earlier in time than their actual appointment date, an additional one to Hispanic officers and one to class members who as of the present date have not rejoined the force. Each letter shall inform each class member of the outstanding judgment of wrongful discrimination, their constructive seniority date and the methodology used to determine their constructive seniority date. All class members shall be asked to provide their veteran status as of their date of constructive seniority and their birthdate. All letters shall inform the class members what the defendants have determined is the first examination they took and ask them to verify this information.

B) From the information provided by defendants, the plaintiffs shall calculate the periods of time during which each class member would have been employed had they been appointed on their constructive seniority date. In the letters, each class member shall be asked to provide the following information for these periods of time:

i) gross earnings

ii) unemployment benefits received

iii) medical expenses

iv) all insurance payments with type of insurance specified

C) In addition to the aforementioned information, all Hispanic officers shall be requested to indicate whether they were ever rejected from the police force or discouraged from taking an examination for the police force due to their height. If the answer to either of the two questions is affirmative, they shall be asked to provide the approximate date of their rejection and/or the approximate date of the examination which they were discouraged from taking.

D) Those class members who are not currently on the force shall receive letters requesting the aforementioned information, as applicable. The letters shall ask these plaintiffs whether they wish to return to the Police Department with their new constructive seniority and inform them that whether or not they shall be allowed to return will be determined by the Court.

E) Copies of the letters shall be provided to the Court and defendants' counsel. The letters shall be mailed and returned to plaintiffs' counsel.

F) Class members shall be informed that they must respond to the letters within 30 days from date of mailing or they will forfeit their entitlements, as established in this lawsuit, unless they can demonstrate good cause for their failure to respond.

7. Within 30 days from the expiration of the period in which class members have to respond to the aforementioned letters, plaintiffs shall provide defendants with a list of inaccuracies, if any, in the data which defendants provided pursuant to paragraphs 5B and C of this order. Plaintiffs shall also provide defendants with a list of all officers who were discriminated against by the height requirement. In addition, plaintiffs shall provide defendants with the income, medical expenses and insurance disbursements of all class members for the periods during which they were denied employment due to the defendants' wrongful discrimination.

8. Defendants shall have 30 days from receipt of plaintiffs' information, described in paragraph 7, in which to submit to plaintiffs' counsel written objections to the data set forth above, other than income data. Should the parties be unable to resolve their differences concerning the afore-

mentioned information within 7 days of plaintiffs' receipt of defendants' objections, hearing shall be held before a special master appointed by the Court at the defendants' expense. Plaintiff shall bear the burden of proof on the issue of discrimination based on discouragement from applying to the police force because of the height requirement. Since all class members have been appointed to the NYPD as police officers, the plaintiffs' qualifications for employment, other than qualification by reason of age, and the desire for employment as police officers—other than such desire on the part of those who suffered by reason of height requirement—shall not be subject to challenge by defendants.

9. Within 30 days of receipt of the information described in paragraph 7 of this order, defendant shall provide all class members for whom there is no dispute as to (1) the first examination they took, (2) their birthdate and (3) their veteran status, all entitlements of their constructive seniority date other than back pay and pension contributions. Class members for whom there is a dispute as to the aforementioned information, shall receive all entitlements of their constructive seniority date other than back pay and pension contributions within 7 days of confirmation of the special master's determination of the first examination they took, their birthdate, or their veteran status.

10. Defendants shall credit, within 90 days of the determination of each class member's constructive seniority date, each class member with the pension rights to which he or she is entitled based on his or her constructive seniority date. Each class member shall have two years within which to make their respective contribution to the pension fund, as required by the employment contract between the NYPD

and the Police Benevolent Association. Each class member shall have the opportunity to waive his or her pension rights within six months from the date on which he or she is informed of the amount of their contribution.

11. The parties are directed to confer with a view to agreeing upon a method for determining the amount of the back pay entitlement of each class member. If no agreement can be reached, each party shall submit its own proposal to the Court within 160 days of the date of this order.

12. On or before December 1, 1979, the defendants shall give a sergeant's examination to those class members who lacked the seniority to take the last sergeant's examination, but whose constructive seniority would have provided them with the seniority necessary for eligibility to take the last sergeant's examination.

13. The defendants are enjoined from laying off any police officers until the seniority and preferred lists of the NYPD are reordered to accord class members their constructive seniority in accordance with this order.

14. In an effort to insure that future hiring practices are non-discriminatory and valid, the defendants shall meet and consult with plaintiffs, their counsel and their experts on the preparation and use of the next police officer examination currently scheduled to be given in June, 1979 and any other police officer examination or selection device to be used in the two years following the entry of this order. Under appropriate security procedures, defendants shall provide counsel for plaintiffs and their experts with any and all documents, as they are prepared, that are used in developing examinations and selection processes.

15. Defendants shall obtain race and ethnicity information from all persons taking the Police Officers examination now scheduled for June 1, 1979. Within 15 days of the date of the examination, defendants shall provide plaintiffs with the numbers of Blacks, Hispanics, Asians, Whites and others who have taken the examination. Within 15 days of the scoring of the examination, defendants shall provide plaintiffs with a complete list of all those who took the examination indicating (a) their score and (b) whether they are Black, White, Hispanic, Asian or other. Within 15 days of the scoring of the examination, the defendants shall also provide plaintiffs with the pass/fail ratios for the aforementioned racial and ethnic groups, as well as a chart detailing what percentage of Blacks, Hispanics, Asians, Whites and others scored in the top 10 percent of those who passed the examination and each succeeding decile.

16. Plaintiffs shall be entitled to payment by defendants of their reasonable attorneys' fees and costs of litigation pursuant to 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988. The Court retains jurisdiction to supervise this order and further proceedings herein and to determine the reasonable value of plaintiffs' attorneys' services and the plaintiffs' costs in this litigation.

Dated: New York, New York
May 14, 1979

/s/ ROBERT L. CARTER
U.S.D.J.

Opinion of District Court (Carter, J.)
Dated February 27, 1979

UNITED STATES COURT OF APPEALS

SOUTHERN DISTRICT NEW YORK

No. 76 Civ. 1982

The GUARDIANS ASSOCIATION OF the NEW YORK CITY POLICE DEPARTMENT, INC., the Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez and Felix E. Santos, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CIVIL SERVICE COMMISSION OF the CITY OF NEW YORK, Department of Personnel of the City of New York, the New York City Police Department, Alphonse D'Ambrose, Individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, James Smith and Josephine Gambino, Individually and in their capacity as members of the Civil Service Commission of the City of New York, and Michael J. Codd, Individually and in his capacity as Commissioner of the New York Police Department,

Defendants-Appellants.

OPINION

ROBERT L. CARTER, District Judge.

This is a class action brought by Black and Hispanic police officers challenging discriminatory hiring and firing practices of the New York City Police Department ("NY

PD"). The case is currently before the court on remand from the Second Circuit for reconsideration in light of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Plaintiffs respond to the remand by making an omnibus motion. They first seek to consolidate this suit with an earlier one between the same parties. Next, they move to amend the complaint in the prior suit to include allegations made in the case at bar. Lastly, they renew their application for a preliminary injunction under a number of separate rubrics.

A chronology of the long history of this lawsuit is required to understand the present motions. In 1972, plaintiffs brought a lawsuit, *Guardians Association* v. *Civil Service Commission of City of New York*, 72 Civ. 928 (*"Guardians I"*), to declare illegal written employment tests and a height requirement used in making appointments to the NYPD. Plaintiffs alleged violations of 42 U.S.C. §§ 1981 and 1983, Article 5, § 6 of the New York State Constitution, and §§ 50 and 52 of the New York Civil Service Law. By endorsement dated July 12, 1973, Judge Ryan of this court denied a motion for a preliminary injunction on the strength of the NYPD's representation that eligibility lists reflecting scores on the challenged examinations were about to expire. That order was affirmed on November 21, 1973. *Guardians Association* v. *Civil Service Commission of City of New York*, 490 F.2d 400 (2d Cir. 1973). The court found:

> There would have been little use in the court's devoting days of much needed time to umpiring a battle of experts concerning the job-relatedness of examinations whose lists were expected to be approaching exhaustion.

490 F.2d 403. After the Court of Appeals' decision, plaintiffs took no steps to continue the litigation, and defendants took no action to dismiss the case.

In June 1975, New York City laid off a number of policemen in response to the fiscal crisis. On March 24, 1976, over two years after the Court of Appeals' decision in *Guardians I*, plaintiffs attempted to bring on before Judge Ryan a motion for expedited discovery on the impact of the layoffs on minority officers. Judge Ryan, by letter dated March 25, 1976, informed plaintiffs' counsel that the case was closed. Plaintiffs' counsel took exception to the court's conclusion because no order closing the case had ever been entered. Nonetheless, no appeal from Judge Ryan's ruling was filed. Instead, the present action (*"Guardians II"*) was commenced before me.

Guardians II was instituted on April 30, 1976.[1] The new complaint restated the constitutional claims made in *Guardians I* and advanced several statutory claims, including an assertion that the NYPD's seniority system and "last-hired, first-fired" layoff policy violated Title VII, 42 U.S.C. §§ 2000e, *et seq*. Transgression of that statute had not been argued in the previous action because an amendment making Title VII applicable to municipal employers had taken effect only on March 24, 1972. A request for an injunction reordering the NYPD's seniority system was added to the prayer for relief. In an opinion issued on March 17, 1977, the court rejected plaintiffs' §§ 1981 and 1983 claims because the evidence failed to show intentional discrimination, an essential element of a constitutional violation under *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Nonetheless, the examina-

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[1] The decision is reported at 431 F.Supp. 526 (S.D.N.Y.1977) (Carter, J.).

tions and height requirement were found to offend Title VII because the NYPD could not justify their discriminatory impact with a showing of "job-relatedness." Since the seniority system perpetuated the effects of the entrance requirements beyond the date Title VII became applicable to municipalities, the court enjoined the NYPD from utilizing its seniority lists for layoff or recall purposes until such time as it could purge the lists of the lingering effects of the discriminatory requirements. *Guardians Association* v. *Civil Service Commission of City of New York*, 431 F.Supp. 526, 536-38 (S.D.N.Y. 1977) (Carter, J.) (*Guardians II*). On June 21, 1977, the Court of Appeals vacated the preliminary injunction and, as indicated previously, remanded the case for reconsideration. 562 F.2d 38 (2d Cir. 1977).

In *Teamsters, supra,* the Supreme Court ruled that a bona fide seniority system which perpetuated pre-Title VII discrimination beyond the effective date of Title VII was not violative of the Act. The Court interpreted § 703(h) of Title VII as immunizing from attack bona fide seniority systems that freeze the consequences of pre-Title VII discrimination. Thus, the Court's mandate effectively overrules this court's prior determination that the NYPD's seniority system, by continuing the effects of past discrimination beyond the date Title VII became applicable to municipalities, violated the Act.[2] A fuller analysis of the impact of *Teamsters* on the merits of this lawsuit is incorporated below in the discussion of plaintiffs' substantive motion to renew the preliminary injunction.

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[2] There was no claim that the NYPD's seniority system was anything less than "bona fide" or "neutral."

> The layoffs, as indicated previously, were made in 1975 pursuant to a last-hired, first-fired seniority system *which no one attacks as discriminatory in any way.* (emphasis added)

Opinion of District Court—February 27, 1979

Plaintiffs' Motion to Consolidate and Amend

The purpose of plaintiffs' motion to consolidate *Guardians I* with *Guardians II* and to amend the complaint in *Guardians I* to include the theories advanced in *Guardians II* seems to be to permit the claims in *Guardians II* to relate back to the date upon which *Guardians I* was filed. Relation back would then permit avoidance of any time bar that may arise from the Supreme Court's holding that a bona fide seniority system *itself* may not be the object of a Title VII challenge. Since today's decision is unaffected by any time bars for bringing a lawsuit under Title VII, I need not keep apace with plaintiffs' procedural acrobatics.

Plaintiffs' Motion to Renew the Preliminary Injunction

Plaintiffs invoke a variety of statutory and constitutional provisions in an effort to renew the preliminary injunction. First, plaintiffs argue that, despite *Teamsters*, they are entitled to relief under Title VII. Second, they contend that evidence adduced at the previous hearing also shows the NYPD's employment practices to have offended Title VI, the Revenue Sharing Act, and the New York Constitution.[3] Third, plaintiffs ask that the court reconsider its ruling that 42 U.S.C. § 1981, like 42 U.S.C. § 1983, requires intentional discrimination.[4] The Title VII claim is addressed

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[3] Approval of plaintiffs' Title VII claim had obviated the need to consider these additional theories in the earlier opinion. *See Guardians II, supra,* 431 F.Supp. 530 n. 2. In view of the disposition under Title VI, I again need not decide the Revenue Sharing Act and New York Constitution claims.

[4] *See Guardians II, supra,* 431 F.Supp. 534. Since this issue is presently subjudice before the Supreme Court, *Davis* v. *County of Los Angeles,* 566 F.2d 1334 (9th Cir. 1977), *cert. granted,* 437 U.S. 903, 98 S.Ct. 3087, 57 L.Ed.2d 1132, *oral arg.* —— U.S. ——, 99 S.Ct. 346, 58 L.Ed.2d 342, I decline to reconsider the earlier holding.

first, since renewing the previous order would render consideration of the other claims superfluous.

A. *Title VII*

Under *Teamsters*, a meritorious Title VII claim against a municipality requires an act of discrimination after March 24, 1972, rather than discrimination before that date whose effects are felt thereafter through a facially neutral seniority system. In the prior opinion, the court concluded that the pre-1973 examinations and height requirement violated the strictures of Title VII. If plaintiffs can now show that the results of those entrance tests contributed to discriminatory acts committed *after* March 24, 1972, the *Teamsters* requirement will have been met.

Stripped of the argument concerning the NYPD's seniority system, plaintiffs' allegations are reduced to claims of discriminatory refusals to hire. Discriminatory refusal to hire is a well established basis for awarding a discriminatee seniority retroactive to the date upon which he would have been hired but for the discrimination. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976). Retroactive seniority is an appropriate remedy so long as the award does not take into account any period before Title VII governed the employer's practices. *Teamsters, supra.* In a situation analogous to the one at bar, Judge Duffy affirmed that *Teamsters* left intact this remedy for Title VII violations. In that case, policewomen, like the minority class members here, had obtained a ruling that the June 1975 layoffs violated Title VII because they were based on a seniority system which perpetuated past discrimination. The ruling was then revised in light of the Supreme Court's opinion in *Teamsters*. *Acha* v. *Beame*, 438 F.Supp. 70 (S.D.N.Y. 1977). Judge Duffy held that

although the bona fide seniority system could no longer provide the basis for attack, class members could still show discriminatory refusal to hire. He stated:

> . . . [A]ny class member who was not hired until after March 24, 1972 and, but for her sex would have been hired earlier than her actual appointment date, is entitled to a seniority revision.

438 F.Supp. 77. The Court of Appeals affirmed, pointing out that it was also open to plaintiffs to prove post-Title VII violations besides discriminatory refusal to hire. *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978). Thus the only effect *Teamsters* has on a post-Act discriminatory refusal to hire claim is to limit awards of compensatory seniority to the effective date of Title VII.

Although none of the challenged examinations were administered after March 24, 1972, appointments based on the results were made until October 7, 1974. Also, appointments based on the height requirement were made until 1973, when the NYPD voluntarily discontinued the practice. Defendants argue perfunctorily that the time of the discrimination must be determined by the dates of the tests and not by the dates of the hiring decisions.[5] Clearly, defendants' position is untenable. Unlawful discrimination

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[5] Defendants also argue that there were no post March 24, 1972 discriminatory acts because hiring off the challenged lists continued by virtue of a court order keeping the lists open. *Kirton* v. *Bronstein*, New York Law Journal, November 13, 1972, p. 17 (S.Ct.N.Y. County). We assume that this order was made in conformity with existing state and city statutes. It is no defense for a municipality to claim that its discriminatory practices were mandated by law. Moreover, defendants' argument assumes that their intent is determinative of whether there was a Title VII violation. It is abundantly clear that Title VII looks to the effect of employment practices and not to the employer's intent.

occurs in the denial of a job based on the examinations, not in the taking of the examinations themselves. There would be little incentive to comply with Title VII if employers could continue to hire from biased eligibility lists because they were based on tests administered prior to the effective date of the Act. Thus refusals to hire minority group applicants after March 24, 1972, on the basis of scores on the examinations or failure to meet the height requirement, are post-Act violations of Title VII.

The violations do not incorporate the hiring decisions affecting all class members certified in the court's previous decision, however. The class, defined as all Black and Hispanic New York City policemen currently on layoff who would not have been furloughed but for defendants' allegedly discriminatory practices, includes patrolmen hired *before* March 24, 1972. Discrimination against them ceased as of the day they were hired, *see Cates* v. *United Airlines, Inc.*, 561 F.2d 1064, 1068 (2d Cir. 1977), and *Teamsters*, therefore, bars their Title VII claims. Thus, only the sub-class of patrolmen hired after March 24, 1972, is entitled to relief. Similarly, members of the sub-class now entitled to relief may receive less seniority because *Teamsters* limits awards of compensatory seniority for municipal employees to March 24, 1972. Thus, despite plaintiffs' protestations, the injunction that may now issue under Title VII is not in all respects as comprehensive as that previously decreed.

Other hurdles lie between plaintiffs and even a partial renewal of the preliminary injunction under Title VII. First, a problem arises from the court's earlier definition of the class as populated by officers "currently on layoff." The NYPD avers that all officers previously laid off have either been rehired (some provisionally under the C.E.T.A. pro-

gram) or have refused offers of re-employment. Nonetheless, the officers' re-employment does not moot the case. The previously furloughed patrolmen still need retroactive seniority to protect against possible future discriminatory layoffs. The class definition is therefore revised to include all Black and Hispanic New York City policemen previously on layoff who would not have been furloughed but for defendants' discriminatory practices.

More importantly, that a sub-class has been victimized by post-Title VII discrimination does not necessarily establish its entitlement to relief. The members of the subclass must also show that they made a timely administrative challenge to the discrimination as defined in *United Airlines* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). There, in a companion case to *Teamsters*, the Supreme Court ruled that a plaintiff, after being laid off and rehired, could not avoid being time-barred from challenging her layoff by styling her claim as a challenge to the lower seniority ranking which followed from the furlough. The Court reasoned that § 703(h) prohibited a finding that a bona fide seniority system, by virtue of its freezing into place the effects of past discrimination, constituted a continuing violation of Title VII. Thus the timeliness of a Title VII challenge must be measured by the date upon which the underlying discriminatory act occurred and not upon the date (often the present) through which the seniority system perpetuated the disadvantage caused by that act.

One of the E.E.O.C. charges filed on May 23, 1975, by the president of the Guardians Association [6] reads as follows:

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[6] Defendatns argue that plaintiffs cannot rely on these complaints because they were filed by the President of the Guardians Association,

> NYC as a whole has a Black and Hispanic population of 40%. The NYCPD has a Black and Hispanic population of only 11.6%. Less than 36 of these minorities are superior officers. It is expected that at the end of the life of the existing lists (entrance and promotion) minority representation in the NYCPD will be considerably less.

This charge clearly encompasses a claim of discriminatory refusal to hire; the only question remaining is whether the filing occurred within the applicable limitations period.

The parties are agreed that 300 days is the correct limitations period because the E.E.O.C. referred the charges to the appropriate New York State agency.[7] *See Macklin* v. *Spector Freight Systems, Inc.*, 156 U.S.App.D.C. 69, 76 n.13, 478 F.2d 979, 986 n.13 (1973); *Acha* v. *Beame, supra*, 438 F.Supp. 75; *see also Love* v. *Pullman*, 404 U.S. 522, 525-26, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972). Since hiring off the lists did not cease until October 7, 1974, it is clear that *some* refusals to hire occurred within 300 days of the filing of the E.E.O.C. charge. Defendants argue that *only* those officers withheld employment during the 300 day period are entitled to relief because each refusal is a discrete act of discrimination. Consequently, patrolmen denied ap-

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who was not himself an "individual plaintiff." This argument is without merit. The Guardians Association is a named plaintiff in these proceedings and its president is clearly authorized to act on its behalf. Where a named plaintiff files E.E.O.C. charges, commences a lawsuit, and has a class certified, "the entire class is given the benefit of the date of the named plaintiff's filing." *See Acha* v. *Beame, supra*, 438 F.Supp. 76.

[7] The following analysis applies only to the examinations. Since the height requirement was terminated over 300 days prior to the filing of the E.E.O.C. complaint, a challenge to it is time-barred. However, this factor does not affect the relief available under Title VII. *See* n. 10, *infra*.

pointment between March 24, 1972 and July 27, 1974 would be ineligible for relief.

Defendants' position ignores the Court of Appeals' determination as to what constitutes a continuing violation under Title VII. After finding that *Evans* did not require abandonment of the concept of a continuing violation under the Act, the court stated:

> A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the *last occurrence* of an instance of that policy. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3rd Cir.), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); *Macklin* v. *Spector Freight Systems, Inc.*, 156 U.S. App.D.C. 69, 76-80, 478 F.2d 979, 986-90 (1973). See also 118 Cong.Rec. 7565 (March 6, 1972). (emphasis in original)
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> * * * *
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> Such a policy of exclusion can be construed broadly to include, inter alia, discriminatory hiring, assignment, transfer, promotion and discharge.

Acha v. *Beame, supra*, 570 F.2d 65. Thus, all that *Evans* decided was that a bona fide seniority system, although it may perpetuate prior discrimination, is not itself subject to attack as a continuing violation of Title VII. Nonetheless, any *other* kind of illegal employment practice may constitute a continuing violation.

Reliance on *Cates* v. *Trans-World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977) for the proposition that the doctrine of continuing violations no longer exists in this circuit is misplaced. First, *Cates* preceded *Acha*. Second, the holding in *Cates* is not at all inconsistent with the rule

espoused in *Acha*. In *Cates*, the Second Circuit relied on *Evans* to deny relief to plaintiffs who, because their refusal to hire claims were time barred, attempted to challenge directly their seniority status resulting from being withheld employment. Nothing was said in *Cates* about the doctrine of continuing violations as applied to underlying refusals to hire being no longer viable in this circuit. In fact, the court referred to the underlying wrong as a "racially discriminatory hiring *system*." *Id.* at 1072 (emphasis supplied). The doctrine did not save the plaintiffs' claims only because the challenge was time barred *even when measured from the date of the last refusal to hire.*[8] Thus the court did not hold that an extended pattern of refusals to hire could not evidence a continuing violation; instead, the court merely applied *Evans*'s holding that a neutral seniority system could not constitute such a violation. *Acha*'s explicit adoption of the doctrine of continuing violations as

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[8] The court reasoned:

> As in *Franks*, the underlying wrong which appellants challenge is not a racially discriminatory seniority system but an allegedly racially discriminatory hiring system which has not functioned since at least 1970. They make no charges of current discrimination or that the seniority system is not bona fide or ever operated in other than a neutral fashion. Their only claim is that appellants occupy a lower spot on the seniority list than they rightfully should because of the perpetuation of prior discrimination. Under *Evans*, this does not charge a present violation of Title VII. Nor does the fact that the present disadvantages arising from past discrimination crystallized in layoffs . . . trigger a new period within which charges may be filed, as the district court believed. . . . [S]ince the neutral seniority system here was insulated from attack by § 703(h), [plaintiffs] can only point to the initial refusal to hire as a violation of Title VII. Because such a claim was not asserted in a timely fashion by any of the appellants, as held by the court below, . . . it has no present legal significance. We therefore affirm the dismissal of appellants' Title VII allegations.

561 F.2d 1072.

applied to discriminatory refusals to hire is clearly the rule of this circuit.

It is obvious to the court that hiring from the department's elibility lists does constitute a continuing policy of discriminatory hiring. The refusal to appoint minorities were not discrete acts; they were all made on the same basis, *viz*, scores on the defective tests. After the tests were administered and the results certified, the NYPD embarked on a discriminatory hiring program which terminated only when the last person was hired off the lists. Since E.E.O.C. charges were filed within 300 days of the last illegal appointment, all plaintiffs are deemed to have made timely challenge to the defendants' discriminatory actions.

One further procedural requirement deserves comment. In *Smith* v. *American Presidential Lines, Ltd. and Marine Engineers' Beneficial Association AFL-CIO*, 571 F.2d 102, 105 (2d Cir. 1977), the Court of Appeals noted that a party charging a continuing violation of Title VII must file with the E.E.O.C. either:

> 1. a charge showing that the discrimination against him is part of a "continuous pattern of identifiable discriminatory conduct" which is timely as to certain enumerated acts within the pattern, or
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> 2. an amended second charge which was timely as to subsequent discriminatory conduct.

Plaintiffs have satisfiled the first test. It has already been shown that the E.E.O.C. charge was timely as to certain enumerated acts within the discriminatory pattern. The language of the charge makes clear that a continuing violation was actually alleged.[9] Therefore, since the *Teamsters*

[9] Plaintiffs described the violation as "continuing" and pointed to the existing lists as the source of the discriminatory pattern.

requirement is met for all class members hired after March 24, 1972, and the *Evans* requirement is met for the entire class, any minority officer hired after March 24, 1972, is entitled to an award of back seniority, so long as the award does not take into account any time period prior to that date.[10] *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Teamsters, supra.* This result would deny some class members relief and limit the relief available to many others. It, therefore, becomes necessary to consider theories urged upon the court that might justify resurrection of the preliminary injunction on behalf of the *entire* class.

B. *Title VI*

Plaintiffs argue that the earlier finding of illegal discrimination under Title VII encompasses a violation of Title VI, the portion of the Civil Rights Act of 1964 that forbids discrimination by recipients of federal funds. Civil Rights Act of 1964, Title VI § 601.[11] That Title requires each department which disburses funds to issue regulations insuring non-discrimination by recipients, to encourage voluntary compliance with such regulations, and to order a termination of the grant when efforts to secure compliance

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[10] Relief to everyone hired post-March 24, 1972 is appropriate despite the height requirement's not being the object of a timely challenge. *See* n. 7, *supra. All* class members took the offending examinations. On that ground alone they are entitled to the relief provided herein.

[11] 42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

fail. § 602.[12] Actions of the agency are subject to judicial review under the Administrative Procedure Act. § 603.[13]

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[12] 42 U.S.C. § 2000d-1 provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

[13] 42 U.S.C. § 2000d-2 provides:

> Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or

Plaintiffs invoke Title VI in support of their claim that the court's previous injunction should be reissued in its entirety.

A threshold requirement for the adhibition of Title VI to a federal grantee's employment practices appears in § 604. That section provides that the rule of non-discrimination shall apply only to the employment policies of a recipient where employment is a primary objective of the grant. That prerequisite is met here, because the NYPD has received and expended federal funds to pay the salaries of policemen and trainees and to finance recruitment programs. Funds have been obtained from the Departments of Labor, Housing and Urban Development, and Justice. See Defendants' Exhibit I, Chapter IX, NYPD Equal Employment Opportunity Program, 9.3 *et seq.*, 9.12 *et seq.*, 9.13 *et seq.* In addition, the NYPD continues to pay policemen with funds disbursed under the Comprehensive Employment and Training Act. Letter of Rosemary Carroll to the court, dated March 28, 1978.

The major problems raised by plaintiffs' reliance on Title VI are whether a private litigant can assert an implied right of action under § 601 and whether injunctive relief (other than a cut-off of funds) may be ordered. A subsidiary issue is the standard governing illegal employment discrimination under Title VI. These questions will be treated consecutively since an affirmative answer to each is a necessary prelude to considering the next hurdle in plaintiffs' argument.

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refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

Opinion of District Court—February 27, 1979

1. *The Implied Private Right of Action Under Title VI*[14]

Whether there is an implied private right of action under Title VI was recently addressed by the Supreme Court in the various opinions filed in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 2d 750 (1978).[15] Four Justices found that a private right existed; [16] four avoided the issue, assuming the existence of the right only for purposes of decision in that case; [17] and one Justice found that such a right did not exist.[18]

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[14] Much of the defendants' brief was devoted to showing that plaintiffs had no standing to allege a violation of Title VI. However, the Supreme Court's decision in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 280, 98 S.Ct. 2733, 2743 n. 14, 57 L.Ed.2d 750 (1978), granting standing to a private party allegedly discriminated against by a federal grantee settles the matter in plaintiffs' favor. This holding was separate from the disagreement on the Court about whether an implied cause of action exists; if no such right exists, private parties still have standing to challenge agency action denying them relief. *See* n. 13, *supra*.

[15] Cases on this issue, prior to *Bakke*, are collected at n. 16 to Justice Powell's opinion for the Court, 98 S.Ct. 2744, and at n. 25 to Justice Stevens' opinion, 98 S.Ct. 2814. Justice Stevens observed that courts "have unanimously concluded or assumed that a private action may be maintained under Title VI." This statement fails to distinguish between decisions finding an implied right of action under § 601 and those merely acknowledging the explicit right under § 603 to judicial review of agency action. At least one court, since *Bakke*, has limited private suits under Title VI to actions of the second type. *NAACP* v. *Wilmington Medical Center, Inc.*, 453 F.Supp. 280, 299-303 (D.Del. 1978). Another court has limited private actions under Title IX in the same way. *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1071-75, *on reh.*, 1077-83 (7th Cir. 1976), *cert. granted*, 438 U.S. 914, 98 S.Ct. 3142, 57 L.Ed.2d 1159, *oral arg.*, —— U.S. ——, 99 S.Ct. 274, 58 L.Ed.2d 253. The issue is still open in this circuit.

[16] Justice Stevens' opinion was joined by Chief Justice Burger and Justices Stewart and Rehnquist. *See* 98 S.Ct. 2814-15.

[17] Justice Powell's opinion was joined, on this issue, by Justices Marshall, Blackmun, and Brenhan. *See* 98 S.Ct. 2744-45.

[18] Justice White's opinion addressed this issue exclusively. *See* 98 S.Ct. 2794-2798.

Justice Stevens contended that the four part test for implying a private right of action set forth in *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), is applicable to claims under Title VI. *Bakke, supra*, 98 S.Ct. 2815 n. 28. He found that the first two requirements, whether the person asserting the private right of action is within the "class for whose *especial* benefit the statute was enacted" and whether the cause of action has not been "traditionally relegated to state law," were clearly satisfied.[19] *Ibid.* (emphasis in original). He then concluded that because Congress had not rejected the alternative of a private right of action to enforce § 601 and because a right to sue directly under that section would be consistent with the legislative scheme, a private right of action should be implied.

In taking an opposing position, Justice White asserted that the express provision of private rights of action for violations of Titles II and VII creates a strong presumption that Congress purposefully omitted a private cause of action from Title VI. *Bakke, supra*, 98 S.Ct. 2795. Nonetheless, it seems to the court that a deliberate intention *not* to afford a private right of action under Title VI is too much to infer from the omission of express language. Justice White fails to note that Congress mentions private rights of action under Titles VII and II only while also specifying restrictions upon the exercise of those rights that do not normally obtain in

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[19] This conclusion was uncontroversial. Justice White argued only that the latter two requirements had not been met.

The officers here are no less entitled to assert a private right of action than was Bakke. The conclusion that Bakke is a person for whose especial benefit Title VI was enacted was predicated upon his being a potential beneficiary of a federally funded program. That description applies equally to the minority officers here who are or may be paid with federal funds.

federal court. For example, Title VII conditioned the right to proceed in court upon a party's first bringing his claim before the Equal Employment Opportunity Commission. 42 U.S.C. 2000e *et seq.* Similarly, Title II provided that a court may defer a request for relief under that section by referring the case to the Community Relations Service. 42 U.S.C. § 2000a-3(d). Failing to create an express private right of action under Title VI is, therefore, wholly consistent with Congress's explicitly creating causes of action only where it also established procedural prerequisites which differ from those ordinarily obtaining in the federal courts. Thus, that there is no express language creating a private right of action in Title VI may only show that Congress did not intend to establish any special procedural requirements for exercising that right in federal court.

Other evidence tending to show that individual discriminatees do not have a cause of action under Title VI may be found in isolated comments made by speakers during the floor debates. *See Bakke, supra,* 98 S.Ct. 2745 n. 28 (Powell, J.). But, again, this evidence is insufficient to demonstrate that Congress *precluded* the possibility of a private right of action. First, there were a considerable number of statements envisioning private court suits made in the debates. *See Bakke, supra,* 98 S.Ct. 2815 n. 28 (Stevens, J.). Second, comments made in the heat of a floor debate are not scholarly exercises in textual exegesis. Rather they are more or less intentional distortions calculated to promote or inhibit passage of a bill. A few negative comments would be a slender reed upon which to rely in concluding that Congress intended to foreclose the possibility of a private cause of action under Title VI. Stronger evidence of a purposeful rejection is required before the court should refuse to consider whether the implication of

such a right would be consistent with the purpose of Title VI's non-discrimination provision when viewed in light of the entire legislative scheme.

Justice White also maintained that a private right of action would impair the administrative mechanism expressly provided by Congress for enforcing the edict of Title VI. The existence of such an impediment would strongly imply that a private right of action is inconsistent with the statute. Justice White reasoned that since Congress surrounded the administrative enforcement process with so many safeguards, it must have intended access to that process to be the exclusive remedy for Title VI violation.

> . . . [A] Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cut-off or of stopping discriminating would not permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

98 S.Ct. 2797. (White, J.). To the same effect is *NAACP v. Wilmington Medical Center, Inc.*, 453 F.Supp. 280, 304 (D.Del. 1978), where the court held that deference to Title VI's administrative process required that the standard of judicial review be whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" [20] and not whether the court, in a trial de novo, would have concluded that there had been unlawful discrimination. This standard, being keyed to the agency's decision, would force the reviewing court to consider that:

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[20] The court adopted the test outlined in the Administrative Procedure Act for review of agency action. 5 U.S.C. § 706(2)(A).

> . . . the suspension of federal aid was a sword which Congress cautioned the agencies to wield judiciously; it was envisioned as a weapon of last resort, designed to provide government agencies with "leverage" in their efforts to secure compliance with this statute.

453 F.Supp. 280, 293. Thus, Justice White in *Bakke* and the court in *Wilmington* seemed to fear that private plaintiffs suing in the District Courts would upset the delicate enforcement machinery established by Congress.

The fault with this view is that it interprets administrative and private remedies as necessarily antagonistic, by needlessly assuming that the relief available in a private suit must be identical to that available through the administrative process. However, since program termination is approved as a remedy only in the section of the statute which creates the administrative enforcement machinery, there seems to be good reason to believe that Congress intended to restrict that sanction to cases where the *agency* seeks such relief or to cases where the private plaintiff can show that the agency's failure to seek such relief was arbitrary and capricious. Thus, all the safeguards contemplated by Congress (i. e., exhausting attempts at voluntary compliance) would obtain in every case before a halt to federal funding was ordered.

The discretionary judgments mandated by the grant termination procedure would not be at all disturbed by a private right of action to redress specific acts of discrimination with familiar forms of declaratory and injunctive relief. Indeed, it makes perfect sense for Congress to have provided a special administrative procedure replete with safeguards against percipitous action for claimants seeking the draconian sanction of program termination, *and* to have permitted the possibility of an ordinary private right of action for parties

requesting less intrusive forms of declaratory and injunctive relief. Thus a private right of action does not undercut the integrity of the administrative procedure; instead, it preserves that integrity by reserving the termination process for cases of last resort, where the systematic nature of the discrimination or the intensity of the opposition to change makes it impossible to effect compliance through ordinary civil suits. There is no reason why the administrative remedy of negotiated compliance backed by the threat of a funding cut-off (with ultimate judicial review of agency action according to the "arbitrary and capricious" standard) can not coexist fruitfully with a private right of action in which discriminatees can receive traditional equitable relief.[21] As Justice Stevens, citing *Rosado* v. *Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), noted in *Bakke*:

> The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a fed-

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[21] Some sort of exhaustion of administrative remedies may be required before a plaintiff can exercise his private right of action in court. For reasons stated below, it would be counter-productive to require parties to demand a cut-off of federal funds before they can file a court action seeking less drastic relief. But it might further the purposes of Title VI to require at least the filing of an administrative complaint, so that the agency may attempt to secure voluntary compliance. It is unnecessary for us to consider the issue here, however. Plaintiffs have either met, or would be excused from any exhaustion requirement ultimately settled upon. First, they filed an administrative complaint with the L.E.A.A. in 1975, which has yet to result in a reordering of seniority. Second, because of the unique history of this lawsuit, this court has already heard testimony and formulated conclusions about whether the NYPD's practices were discriminatory. The only issue still "live" is an exclusively legal one, *viz*, whether the plaintiffs, on the facts as found in *Guardians II*, can receive the same relief under Title VI as they previously received under Title VII.

> eral statute that authorizes termination of funds has clearly been rejected by this Court in prior cases.

98 S.Ct. 2815 n. 26.

One further point deserves comment. The court in *NAACP* v. *Wilmington Medical Center, Inc.*, 453 F.Supp. 280 (D.Del. 1978), rejected the argument that implying a private right of action would facilitate enforcement of an important Congressional policy because it thought the approach overinclusive:

> Enforcement of *every* federal statute would be assisted by implying a private cause of action to parallel an already existing administrative mechanism created by Congress. But such a result in itself is not an acceptable rationale for expanding the statutory remedies explicitly provided by the legislature. (emphasis supplied)

453 F.Supp. 302. This response ignores the reason why implying a private right of action under Title VI is *especially* appropriate. Under the statute, administrative agencies are empowered to effect compliance in only two basic ways. They can seek voluntary compliance from grantees or, failing that, order a cut off of federal funds. That choice puts a claimant in the unenviable position of threatening to terminate a program of which he may be a primary beneficiary.[22] Where the victims may suffer worse than the perpetrators, there cannot be a very strong incentive to ignite the administrative process against recalcitrant employers. "Relief" as

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[22] For example, if plaintiffs (especialy those employed under the C.E.T.A. program) pursue their claim administratively to the point where funds are withheld, they may lose their jobs instead of recovering compensatory seniority.

drastic as program termination may be, in fact, worse than no relief at all. This factor adds dimension to the conclusion of Justice Stevens that:

> . . . [T]he principle embodied in § 601 involves *personal* Federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965 . . . is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures.

98 S.Ct. 2815 n. 28. Thus, I conclude that a private right of action is implied by § 601's unequivocal prohibition of discrimination in federally funded programs and, for reasons outlined above, I also conclude that all forms of equitable relief are available to a private plaintiff suing under Title VI.

2. *Standard for Discrimination Under Title VI.*

Plaintiffs maintain that the "effect" standard enforced under Title VII should apply to employment discrimination challenged under Title VI, while defendants urge that the court adopt the "intent" standard now administered under the Equal Protection Clause. The relevant analysis begins with the language of Title VI [23] and the regulations promulgated thereunder by agencies providing funds to the NYPD. The Labor Department's employment practices regulation reads as follows:

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[23] *See* n. 11, *supra.*

> Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program including recruitment, examination, appointment, training, promotion, retention or any other personnel action.

29 C.F.R. § 31.3(c)(1). The Departments of Justice and Housing and Urban Development have substantially similar regulations. 24 C.F.R. § 1.5(c)(1) (H.U.D.); 28 C.F.R. § 42.104(c) (Justice).[24] Thus, the question is whether the "discrimination" outlawed need be purposeful or whether it is enough that the challenged policies have a disparate impact on minorities for which there is no countervailing justification.

Support for the thesis that Title VI does not ban only intentional discrimination is overwhelming. The regulations are full of language that evidence an intent to disallow practices with a discriminatory impact. For example, 24 C.F.R. § 1.4(b)(2)(i) (H.U.D.) prohibits a recipient from utilizing "criteria or methods of administration which have the *effect* of subjecting persons to discrimination." Similar provisions may be found at 28 C.F.R. § 42.104(b)(2) and (3) (Justice), and 29 C.F.R. § 31.3(b)(3) (Labor). More importantly, the Supreme Court has held that Title VI disallows measures that have the effect of denying minorities

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[24] The Attorney General was ordered to coordinate the Title VI programs of the departments and to "adopt consistent and uniform policies, practices, and procedures with respect to the enforcement of Title VI of the Civil Rights Act of 1964." Exec. Order No. 11247, 30 Fed.Reg. 12327 (1965), *reprinted in* 42 U.S.C. § 2000d-1, at 263.

treatment as equals even though that result may not have been the grantee's intention. In *Lau* v. *Nichols*, 414 U.S. 563, 568, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), the Court upheld regulations issued by the Department of Health, Education, and Welfare barring practices which, although not so intended, nevertheless effectively denied equal educational opportunity to Chinese-speaking students. I am aware of no decision of a court, prior to or subsequent to *Lau*, holding that a discriminatee under Title VI must show intentional discrimination.[25]

Defendants argue that *Goodwin* v. *Wyman*, 330 F.Supp. 1038 (S.D.N.Y. 1971) (three-judge court) (per curiam) is authority to the contrary because the court there said:

> Essentially, the same showing is required to establish a violation of 42 U.S.C. § 2000d as is required to make out a racial discrimination violation of the Fourteenth Amendment's Equal Protection Clause.

330 F.Supp. 1040 n. 3. Defendants' reliance on this statement is misplaced. First, *Goodwin* was decided before *Lau*. Second, *Goodwin*'s equation of Title VI and the 14th Amendment predates *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the first Supreme Court case to make clear that the 14th Amendment prohibits only intentional discrimination. Prior to the Court's decision in *Washington*, the "effect" and "intent" standards were often applied interchangeably. *See e. g., Dandridge* v. *Williams*, 397 U.S. 471, 485 n. 17, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).

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[25] For examples of courts applying the effect standard, *see Pabon* v. *Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976) (Weinfeld, J.); *Soria* v. *Oxnard School District Board of Trustees*, 386 F.Supp. 539 (C.D.Cal. 1974). In *Bakke*, Justices Powell and Stevens noted *Lau's* holding that Title VI prohibited policies with a discriminatory effect without indicating any disapproval.

Moreover, defendants misread the holding in *Goodwin* itself. In that case, New York State recipients of Aid to Dependent Children and Home Relief challenged a statute which reduced their benefits while maintaining constant payments to recipients of Old Age Assistance, Aid to the Blind, and Aid to the Disabled. The selective reductions concededly had a disproportionate impact on minorities. From the court's approval of the statute, defendants have apparently concluded that an "intent" and not an "effect" standard must have been applied.

The court in *Goodwin,* however, acknowledged that "a welfare statute or regulation which is 'infected with a racially discriminatory purpose *or effect* is inherently suspect' " (italics added) (citations omitted). The cuts were upheld only because the court found a compelling state interest in discontinuing benefits to groups of welfare recipients "potentially capable of becoming self-supporting" while "maintaining welfare benefits furnished to citizens who are physically unable to provide for themselves." 330 F.Supp. 1041. Thus the Court's inquiry was structured very much like that in a Title VII case. After ascertaining that the legislation had a discriminatory *impact,* the court inquired as to whether a compelling justification (like business necessity under Title VII) rendered the statute acceptable.

Justice Powell's pronouncement that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause," *Bakke, supra,* 98 S.Ct. 2747, also does not indicate a view contrary to *Lau.* The question in *Bakke* was whether Title VI prohibited *all* racial classifications *per se* or whether it, like the 14th Amendment, prohibited only those racial classifications for which there is no compelling justification. Justice Powell concluded that the two provisions were alike in respect of their prohibiting only unjustified racial classifications. This inter-

pretation, however, says nothing about whether Title VI was designed to reach practices which, although not involving explicit racial classifications, have the effect of disproportionately harming minorities and have no justification in necessity. Concluding that Title VI is like Title VII in prohibiting these practices (and not like the 14th Amendment) is not at all inconsistent with the holding in *Bakke*.

The broad remedial purpose of Title VI shows its close kinship with Title VII. Both Titles were passed at the same time as part of the same act; Title VII applied to private employers while Title VI covered employers who received federal funds targeted to provide employment. It seems to me that a heavy burden rests upon one who theorizes that Congress simultaneously was of two minds on the appropriate standard for employment discrimination, requiring only "disproportionate impact" in one area and "purposefulness" in the other. Furthermore, if Congress indeed entertained two standards in 1964, one would imagine that it would have been more careful in preserving their separateness when, in 1972, by amending Title VII to apply to municipal employers, it allowed for some overlap between the two titles. The evidence presented by defendants is insufficient to sustain the counter-intuitive result they urge upon the court. It seems far more likely that Congress, not yet ready in 1964 to extend Title VII coverage to all governmental employers, accomplished a similar but more limited purpose in Title VI.

Since the substantive standard for illegal employment discrimination is the same under Title VI as it is under Title VII, and all forms of traditional equitable relief are available under Title VI, it seems logical to adopt the body of remedial law already developed under Title VII. Similar kinds of remedies should apply unless they would conflict with some purpose peculiar to Title VI. In the

instant case, back seniority, approved as a Title VII remedy in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), is just as necessary to make discriminatees "whole" under Title VI. Although the statutory predicate has changed, there is no reason for the relief provided here to be any less comprehensive than that previously ordered in *Guardians II*.[26]

The analysis of how defendants engaged in discriminatory refusals to hire based on the tests and the height requirement remains the same.[27] The only difference is that *all* the refusals to hire were post-Act refusals because Title VI took effect on July 2, 1964.[28] Accordingly, all the members of the class may obtain relief, and their awards of compensatory seniority may extend all the way back to the date upon which they would have been hired but for defendants' discriminatory practices. Thus, the total effect of today's decision that the NYPD's employment practices violated Title VI is to reinstate the preliminary injunction previously issued under Title VII.

Plaintiffs' motion to renew the preliminary injunction is granted under Title VI in accordance with this opinion. I decline to decide plaintiffs' procedural motions because they are unnecessary to the resolution of the case.

SETTLE ORDER.

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[26] The employment practices regulations under Title VI are quite comprehensive. For example, 28 C.F.R. § 42.105(c)(1) (Justice) requires non-discrimination in recruitment, recruitment advertising, employment, layoff, termination, upgrading, demotion, transfer, rates of pay or other forms of compensation, and use of facilities. Many of these practices depend upon seniority rankings.

[27] The Title VI challenge to the height requirement is timely.

[28] The regulations took effect on December 4, 1964 (Labor), January 3, 1965 (H.U.D.) and July 29, 1966 (Justice).

Order of Court of Appeals Dated June 21, 1977 Vacating Judgment and Remanding to District Court

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 1340, Docket 79-7377

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of June one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD
Circuit Judge
HON. EDMUND L. PALMIERI
HON. RUSSELL E. SMITH
District Judges

The GUARDIANS ASSOCIATION OF the NEW YORK CITY POLICE DEPARTMENT, INC., the Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez and Felix E. Santos; Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

CIVIL SERVICE COMMISSION OF the CITY OF NEW YORK, Department of Personnel of the City of New York, The New York City Polic Department, Alphonse D'Ambrose, Individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, James Smith and Josephine Gambino, Individually and in their capac-

ity as members of the Civil Service Commission of the City of New York, and Michael J. Codd, Individually and in his capacity as Commissioner of the New York Police Department,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is vacated and the case is remanded to the district court for further consideration in the light of *International Brotherhood of Teamsters* v. *United States*, Docket No. 75-636, —— U.S. —— 45 U.S.L.W. 4506 (May 31, 1977).

/s/ WALTER R. MANSFIELD
Walter R. Mansfield, U.S.C.J.

/s/ EDMUND L. PALMIERI
Edmund L. Palmieri, U.S.D.J.

/s/ RUSSELL E. SMITH
Russell E. Smith, U.S.D.J.
(per WRM)

Opinion of District Court (Carter, J.)
Dated March 17, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 76 Civ. 1982.

The GUARDIANS ASSOCIATION OF the NEW YORK CITY POLICE DEPARMENT, INC., et al.,

Plaintiffs,

v.

CIVIL SERVICE COMMISSION of the CITY OF NEW YORK et al.,

Defendants.

ROBERT L. CARTER, District Judge.

Statement of the Case

This action challenges the legality of the hiring and firing practices of the New York City Police Department ("NYCPD"). Jurisdiction is based on Title 28 U.S.C. §§ 1331 and 1343(3), (4) and 42 U.S.C. §§ 1981, 1983 and 2000e-5(f)(3).[1] Plaintiff alleges that defendants' prac-

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[1] 42 U.S.C. § 2000e-5(f)(1) provides that if complainants wish to bring suit on the basis of the alleged discriminatory acts described in their charges filed with the Equal Employment Opportunity Commission ("EEOC"), they must do so within 90 days of receiving the EEOC's "notice of right to sue" letter. There is no question that plaintiffs have complied with this provision. The Hispanic Society filed charges with the EEOC, and received its "right to sue" letter on April 16, 1976. The Guardians Association received a separate right to sue letter on August 4, 1976. Suit was filed by these plaintiffs on April 30, 1976. With respect to the Hispanic Society, the instant action was filed well within 90 days of receiving its "right to sue" letter. As for the Guardians Association, it is properly before the

tices violate the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983 and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*[2] Plaintiffs have moved for a preliminary injunction restraining the NYCPD from firing or recalling any police officers until seniority lists are reordered to accord plaintiffs the seniority they would have had but for defendants' discriminatory practices. Plaintiffs also seek certification of a class consisting of black and Hispanic officers who were subject to layoff in June, 1975. For the reasons set forth below, plaintiffs' motions are granted.[3]

Procedural Background

This action was commenced May 3, 1976, by an order to show cause seeking a temporary restraining order and a

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court for two reasons. First, the issuance of a "suit" letter by the EEOC validates a pending action brought by a complainant. *Henderson* v. *Eastern Freight Ways, Inc.*, 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied*, 410 U.S. 912, 93 S.Ct. 976, 35 L.Ed.2d 275 (1973). Second, plaintiffs in a ceritfied class action, see *infra*, are properly before the court even where they commenced their action prior to receiving their notices, as long as one plaintiff initiating the suit has a "right to sue" letter. *Leisner* v. *New York Tel. Co.*, 358 F.Supp. 359, 362 n. 1 (S.D.N.Y. 1973) (Motley, J.).

[2] Plaintiffs also allege that defendants' practices violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the Revenue Sharing Act of 1972, 31 U.S.C. § 1221 *et seq.*; and Article 5, Section 6 of the New York Consttiution. In view of the court's determination of the constitutional and Title VII claims, the merits of these other claims need not be reached.

[3] It appears that both plaintiffs and defendants have fully presented their case and that a permanent injunction might be granted at this time. However, since there is some possibility that all proof has not been proffered, both parties will be given an opportunity to present further evidence at a plenary trial should they desire. If neither party wishes to take advantage of this opportunity a permanent injunction shall be granted. Nevertheless, a hearing will be necessary to determine the relief that is warranted for the various members of the class.

preliminary injunction. The application for a temporary restraining order was denied. A hearing on the application for a preliminary injunction was held on May 12, 1976. At the hearing, defendants moved to dismiss the complaint on the grounds of statute of limitations, laches, and lack of subject matter jurisdiction. Their motion was denied, and the hearing commenced. It continued intermittently until July 29, 1976.

Having heard that the NYCPD intended to recall previously laid off police officers, plaintiffs in the early part of July renewed their application for a temporary restraining order barring such recall pending determination of the rights of the discharged black and Hispanic police officers in this litigation. The court denied this application on the basis of an affidavit of Michael J. Codd, Police Commissioner, which recited that all recalled officers were to be notified that their rights to employment were subject to any determination that might be made in this pending litigation.

Factual Background

Plaintiffs are black and Hispanic police officers on layoff since June, 1975. They allege that the NYCPD's use of its pre-1973 entry level examinations and its former requirement that all police officers be 67 inches or taller discriminated against them, and that but for this discrimination they would have accrued sufficient seniority to withstand being fired. Defendants are the NYCPD, the New York City Department of Personnel, whose staff prepare and administer the examinations, and the Civil Service Commission, which prescribes rules for administering the civil service laws.

Because of the fiscal crisis affecting the entire city, the NYCPD was required to cut its budget by three percent. As

a result, 2,864 police officers were discharged in June, 1975, pursuant to the last-hired, first-fired seniority system existing in the NYCPD. Plaintiffs complain that these terminations, 21.5 percent of which were minorities,[4] perpetuate defendants' past discriminatory practices, and violate the strictures of the Fourteenth Amendment, Title VII and 42 U.S.C. §§ 1981 and 1983.

Class Action Certification

For class action treatment to be appropriate, all the requirements of subdivision (a), and one of the alternative requirements of subdivision (b), of Rule 23, Fed.R.Civ.P. must be satisfied.[5] There is little doubt that plaintiffs have met the first three requirements of Rule 23(a).

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[4] In this opinion, the term "minorities" shall mean blacks and Hispanics.

[5] Rule 23, Fed.R.Civ.P., provides, in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient

1. *The Numerosity Requirement*

The proposed class consists of all black and Hispanic New York City policemen currently on layoff who would not have been furloughed but for defendants' allegedly discriminatory employment practices. Plaintiffs make the uncontroverted allegation that the class numbers between 200 and 600 blacks and Hispanics. Given these figures, the numerosity requirement is clearly met. *Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972); *Ste. Marie* v. *Eastern R. R. Ass'n*, 72 F.R.D. 443 (S.D.N.Y. 1976) (Carter, J.).

2. *Common Questions of Law or Fact*

Race discrimination cases, by their very nature, involve behavior that affects a group of people. *Rodriguez* v. *East Texas Motor Freight Co.*, 505 F.2d 40, 50 (5th Cir. 1974); *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). Plaintiffs here claim that defendants' practice of discharging police officers based on their seniority violates Title VII and 42 U.S.C. §§ 1981 and 1983 by perpetuating discrimination effected by the use of racially biased entry level examinations and a discriminatory height requirement. It is clear that these claims:

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adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

> "not only can, but most appropriately should be decided as a class action since 'the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.*, race, sex, religion, or national origin.' . . ."

Hecht v. *Cooperative for Am. Relief Everywhere, Inc.*, 351 F.Supp. 305, 312 (S.D.N.Y. 1972) (Lasker, J.) (citations omitted).

3. *Representative Parties' Claims Typical of the Claims of the Class*

The claims of the representative parties are typical of most of the class. The individual plaintiffs claim to be on layoff either as a result of defendants' discriminatory use of entry level examinations or as a result of defendants' discriminatory height requirement. Plaintiff organizations include members who have been victims of both these practices. Together, their claims range over the totality of defendants' challenged employment practices. Thus, the typicality standard is met.

4. *Fair and Adequate Protection of the Class' Interests*

In *Mersay* v. *First Rep. Corp. of Am.*, 43 F.R.D. 465, 469 (S.D.N.Y.1968) Judge Metzner held that:

> "the requirement of adequate representation comprises only two elements: (a) that the interests of the representative party must coincide with those of the class; and (b) that the representative party and his attorney can be expected to prosecute the action vigorously. *Dolgow* v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968)."

Defendants presumably contest the adequacy of plaintiffs' representation by contending that in *Guardians Ass'n of New York City Police Dep't* v. *Civil Serv. Comm'n*, 72 Civ. 928 (S.D.N.Y., July 16, 1973) (Ryan, J.) ("*Guardians I*"), a suit brought under 42 U.S.C. § 1983, plaintiff associations took a position incompatible with the one taken here. Defendants argue that in the previous action these associations sought a permanent injunction against the use of lists predating 1972 for appointments to the Police Department. Therefore, it is claimed, since the individual plaintiffs in the instant case obtained appointments from pre-1972 lists "precisely because the relief sought by these associations was denied in *Guardians I* . . . [the] assoications represented interests directly adverse to [those of] the individual plaintiffs herein." Def's. Post-Trial Memo. at 5. This argument is patently without merit.

In the earlier suit, plaintiff sought to enjoin the use of pre-1972 officer eligibility lists out of the fear that a disproportionately low number of minorities would be hired due to the discriminatory impact of the examinations from which the lists were prepared. This is made clear from plaintiffs' alternative request to establish a quota of one minority appointment for every white appointment. The relief sought was denied since it appeared that the lists were being exhausted and all the plaintiffs would be hired.

The premise of that suit is consistent with that asserted here. In both cases, the thrust of plaintiffs' attack is directed toward the use of employment requirements which discriminate against minorities. Accordingly, I am convinced that the interests of the plaintiff associations coincide with those of the class, and based on the extensive work already conducted by plaintiffs, they can be expected to prosecute the action vigorously.

Defendants also argue that plaintiff Santos could not have been appointed as a police officer until he was a United States citizen and that he did not become a citizen until the time of a hiring freeze; therefore he is unable to show that he could have been appointed earlier than he actually was. Plaintiff Perez, defendants assert, challenges the height requirement but has never failed a police officer examination and does not claim the written examination discriminated against him. To the extent these assertions suggest inadequate representation or atypicality of claims, they pose no bar to certification of the class. They may present individual questions which will determine each individual's right to recovery, but Rule 23 gives the court the power to consider individualized problems if and when they appear. *Ste. Marie* v. *Eastern R. R. Ass'n, supra.* In any event, since plaintiff organizations are suitable representatives, the potential disqualification of Santos and Perez poses no threat to the viability of this class suit.

5. *Action or Inaction on Grounds Generally Applicable to Class—Appropriateness of Injunctive or Declaratory Relief (Rule 23(b)(2))*

Plaintiffs have asked for declaratory and injunctive relief that would prevent defendants from perpetuating allegedly discriminatory hiring practices. Plaintiffs also seek damages. This situation is well-suited for class action treatment under subdivision (b)(2) of Fed.R.Civ.P. 23, since a finding that defendants' practices are unlawful will necessarily affect all minority police officers. *See* Advisory Committee Notes to Fed.R.Civ.P. 23, and cases cited therein; *Leisner* v. *New York Tel. Co.*, 358 F.Supp. 359, 373 (S.D.N.Y. 1973); *Rosario* v. *New York Times*, 10 EPD ¶ 10,450 p. 5944 (S.D.N.Y. 1975). A claim for damages

may properly be considered in a (b)(2) action as long as the monetary relief is not predominant. *Almenares* v. *Wyman*, 334 F.Supp. 512, 519 (S.D.N.Y.), *modified* 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944, 92 S.Ct. 962, 30 L.Ed.2d 815 (1972); *Lynch* v. *Sperry Rand Corp.*, 62 F.R.D. 78, 85 (S.D.N.Y. 1973).[6]

Accordingly, plaintiffs' motion for certification of a plaintiff class is granted.

Entry Level Examinations

In order to be appointed a police officer, an applicant must, among other things, achieve a 75 percent score on a written examination. Individuals who pass this examination are ranked on an eligible list in order based on their scores.[7] The highest ranked are the first to be given available jobs. The lowest ranked are the last to get jobs, and consequently are the first to be fired when there are layoffs. Plaintiffs contend that the use of these examinations prior to 1973 violated both their constitutional and statutory rights.

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[6] Certification would also be appropriate in this case under subdivision (b)(3) of Rule 23. Since both sections are available it is preferable to certify the class under (b)(2) since the availability of the right to opt out in a (b)(3) class action would unnecessarily complicate matters where injunctive relief is called for.

Moreover, a (b)(3) class suit would present notice problems by calling into play the protection that subsection (c)(2) provides to (b)(3) class members. It would require "individual notice to all members who can be identified through reasonable effort." *See Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173, 94 S.Ct. 2140, 2150, 40 L.Ed.2d 732 (1974).

[7] An applicant's score is adjusted upward five points if he is a military veteran, and an additional five points if he is a disabled veteran. Plaintiffs make no claim that such adjustments have a racially discriminatory impact.

1. *Constitutional Claims*

In *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Supreme Court upheld the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department even though the test had a discriminatory impact in screening out black candidates. The Court of Appeals had declared a lack of discriminatory intent irrelevant to establishing a constitutional violation. The Supreme Court reversed, holding that the circuit court "erroneously applied the legal standards applicable to Title VII cases [8] in resolving the Constitutional issue before it," *viz,* whether the use of the qualifying examination invidiously discriminated against blacks and hence denied them their due process rights contrary to the commands of the Fifth Amendment. The Supreme Court continued:

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose is unconstitutional *solely* because it has a racially disproportionate impact."
> (citation omitted)

[8] Title VII was not applicable in this case. *See id.* at 238, n. 10, 96 S.Ct. 2040.

Id. at 239, 96 S.Ct. at 2047. The rule in other equal protection cases is likewise a requirement that plaintiffs show intentional discrimination, not merely discriminatory impact. *Id.* at 239-41, 96 S.Ct. 2040. It follows that §§ 1981 [9] and 1983 [10] require the same showing.[11]

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[9] Title 42 U.S.C. § 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."

[10] Title 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[11] Plaintiffs have sued, *inter alia*, the Civil Service Commission of the City of New York, the Department of Personnel of the City of New York, and the New York City Police Department. In light of the Second Circuit's recent opinion in *Monell* v. *Department of Soc. Servs. of the City of New York*, 532 F.2d 259 (2d Cir. 1976), there is some doubt as to whether any or all of these defendants can be liable under § 1981 or § 1983. The court in *Monell* wrote:

> "[i]t is common ground that a municipality is not itself a 'person' under the Civil Rights Act, *Monroe* v. *Pape*, [365 U.S. 167, (1961)] at 187-92, 81 S.Ct. 473, at 484-86, 5 L.Ed. 2d 492, at 505-07; *City of Kenosha* v. *Bruno*, [412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973)] and that a state or county is also not such a person' . . . . By like token, a department of such government is not a 'person.' . . ."
> (citations omitted)

Id. at 262-63. *Melani* v. *Board of Education of the City of New York*, 12 EPD ¶ 11,068 (S.D.N.Y. 1976) (Gagliardi, J.). *See also International Soc'y for Krishna Consciousness, Inc.* v. *New York Port Authority*, 425 F.Supp. 681 (S.D.N.Y. 1977) (Carter, J.).

While an individious discriminatory purpose may often be inferred from a practice which affects a definable minority race or group more than the majority, disproportionate impact "is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242, 96 S.Ct. at 2049. In the instant case, while the discriminatory impact of entry level examinations seems clear enough, the tests used by the NYCPD, like the examination upheld in *Washington* v. *Davis*, appear to be facially neutral and "rationally may be said to serve a purpose the Government is constitutionally empowered to pursue." *Id.* at 246, 96 S.Ct. at 2051.

Plaintiffs attempt to show discriminatory intent primarily from the fact that instead of administering a general qualifying examination, the NYCPD used entry level tests which it knew had a discriminatory effect in screening out minority candidates. The proof of intent offered by plaintiffs here differs little from that before the Supreme Court in *Washington* v. *Davis* and accordingly must be deemed insufficient.

Defendants here were constrained by the New York State Constitution, Article 5 § 6 and the Civil Service Law § 50 *et seq.* to select employees for civil service positions based upon individual merit and fitness, to be determined, where practical, by competitive examination. The position of police officer is a competitive title, and appointments are made from eligibility lists compiled on the basis of ratings received by the candidates on the competitive portions of the examinations. Civil Service §§ 50(6) and 61. Absent a showing that the entry level examinations were purposely *designed* to keep minorities out of the police force, *Washington* v. *Davis* requires that such procedures be sustained even if they have the result of screening out minorities.

Defendants have proffered evidence of recruitment efforts on their part to demonstrate their good faith, including the creation of a recruitment squad within the department's Personnel Bureau in 1967; participation in, and adoption of recommendations made by, a nine month Rand Institute Study in 1968-69; the use of a federally funded "Community Service Office" program, employing mostly minorities in quasi-police positions for the purpose of absorbing them into the police officer ranks; a cadet program begun in 1966 which paid minority youths receiving training in the Police Academy; and the establishment of an Equal Employment Opportunity office. As a result of their commitment to increase minority representation, defendants claim that 23 percent of all new police recruits hired since 1973 were minority members.

Plaintiffs challenge the defendants' assertion of bona fides with respect to minority recruitment. They argue that prior to 1970 the NYCPD made no real efforts to increase the number of minority police, nor was support given to recruitment efforts made by plaintiffs. Moreover, plaintiffs charge, the police department's recruitment program began in earnest in 1972, only after Title VII became applicable to municipalities and litigation was threatened. Finally, it is argued, defendants' recruitment efforts began after a freeze was placed on hiring, and whatever gains had been made were later wiped out by the layoffs.

Even were these allegations enough to controvert defendants' evidence of good faith with respect to recruitment, they are nonetheless insufficient to meet the intentional discrimination requirements of *Washington* v. *Davis*. Mere absence of recruitment efforts, by itself is not equivalent to an intent to discriminate. Also, even if the police department's stepped-up recruiting program can be

directly linked to the threat of litigation after Title VII became applicable to municipalities, this alone is still no evidence of discriminatory intent. The applicability of Title VII to municipalities would establish prima facie liability on the part of the police department upon a showing that its hiring practices had a discriminatory impact regardless of intent. Taking steps to avoid such liability cannot justifiably be characterized as tantamount to admitting discriminatory intent. Nor is it reasonable to impugn the police department's recruitment efforts after 1972 because the city's financial problems required budget cuts and the imposition of a job freeze. The fact that subsequent layoffs by seniority eliminated recruitment gains may make out a Title VII cause of action, but it cannot stand for proof of invidious discrimination proscribed by the 14th Amendment to the Constitution of the United States under the *Washington* v. *Davis* rationale.

The strongest evidence of defendants' discriminatory intent was the testimony of Police Commissioner Murphy and Deputy Commissioner Ward. Murphy testified that the NYCPD and the Department of Personnel did not try as hard as he would have liked to increase minority representation on the police force, but he never stated that either actively discriminated against blacks and Hispanics. In fact, he characterized the department's actions to recruit and retrieve minorities at least during his tenure (Oct., 1970 to May, 1973) as good faith efforts. Tr. 1130-32. He also stated that there was "a Civil Service effort to improve as much as it could the written examination." Tr. 1132.

The testimony of Deputy Commissioner Ward is a more unqualified condemnation of the defendants motivations. What he has characterized as intentional discrimination, however, is the complacency of officials in the police department and the Department of Personnel with respect to the

status quo and their failure to take more active steps toward increasing minority representation. Taken as a whole this testimony falls far short of establishing liability under the Constitution or §§ 1981 and 1983.

2. *Title VII Claim*[12]

a. *Applicability of Title VII*

Plaintiffs challenge the job-relatedness of all pre-1973 entry level examinations.[13] However, the specific harm complained of in this action is not the decision to hire or not to hire based on the results of these pre-1973 examinations, but rather the decision to layoff police officers as a result of budget cuts. The layoffs, as indicated previously, were made in 1975 pursuant to a last-hired, first-fired seniority system which no one attacks as discriminatory in any way. Defendants claim that since the only acts complained of took place prior to the date Title VII was made applicable to municipalities, the standards of Title VII do not apply to this case.[14] Additionally, defendants contend

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[12] Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) now reads as follows:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

[13] Although plaintiffs do not challenge the 1973 examination, they do not concede its validity. As the discussion *infra* will show, the 1973 examination is substantially different than those used earlier, and while the court makes no determination as to the validity of the 1973 examination, there seems little question that the later examination is measurably superior to those previously used.

[14] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, was amended in March 1972, to include municipalities as "employers" under the Act.

that plaintiffs have not met the procedural requirements of Title VII, since neither any individual plaintiff nor the Guardians and Hispanic Associations filed timely charges with the Equal Employment Opportunity Commission ("EEOC").[15]

Decisions in this circuit and elsewhere, however, do not support defendants' position. To the contrary, the layoff of police officers in 1975 brings the pre-1972 alleged discriminatory practices within the scope of Title VII. In *Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976), two women who were formerly police officers brought suit under Title VII and under the Fourteenth Amendment, alleging that threatened NYCPD terminations unlawfully discriminated against women.[16] The plaintiffs in *Acha* alleged, *inter alia*, that the facially neutral seniority system[17] perpetuated the past discriminatory practices of the Police Department, and that the layoffs violated their Title VII statutory rights.

Acha did not specifically deal with the contention raised here by defendants that Title VII does not apply since the only post-Act practice complained of is the application of a neutral seniority system. Nevertheless that contention was implicitly rejected by the Court of Appeals.

Plaintiffs' complaint had been dismissed by this court (Duffy, J.) primarily on the ground that Section 703(h)

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[15] The filing of a timely charge wtih the EEOC has been held a jurisdictional prerequisite to a private action under Title VII. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[16] The threatened furloughs were the 1975 layoffs involved in this case, which resulted from the city's cut of the Police Department's budget.

[17] The layoffs in *Acha*, as here, were made pursuant to § 80 of the New York Civil Service Law, which plaintiffs concede is a facially neutral non-discriminatory seniority system.

of Title VII, 42 U.S.C. § 2000e-2(h) excepts from the sanctions of Title VII the application by an employer of "different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system." Judge Duffy had also held that section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), protected the defendants since to grant plaintiffs' requested relief would constitute unlawful preferential treatment on the basis of sex.

The Court of Appeals reversed, holding that neither section 703(h) nor 703(j) of Title VII insulated the defendants from a valid Title VII claim. The court stated:

> "If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), since *it* is based on sexual discrimination. . . .
>
> Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered 'bona fide' and in fact represents a continuation of past intentionally discriminatory practices, and this falls outside the terms of section 703(h)." 531 F.2d at 654-55 (emphasis added).

The court also disagreed with Judge Duffy's holding as to Section 703(j) and held instead that an award of seniority to those who had been actually discriminated against would not constitute a "preference", but would rather be a remedial action well within the power delegated the courts by Title VII. *Acha, supra* at 656.

Although defendants' argument here is a variation of that used in *Acha,* the point remains the same. If defendants'

position in either case were correct, Title VII would be unavailable to individuals seeking to remedy past discrimination unless they could show discrimination in hiring by a municipality which occurred after the passage of the March 24, 1972 amendment to Title VII. This position has been rejected by federal courts on numerous occasions. In *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *rev'd in part on other grounds* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), it was expressly held that while Title VII was intended to have prospectve application only, it did provide relief based on pre-Act discrimination if there are present and continuing effects of such discrimination. 420 F.2d at 1230. *See also, Local 53 of Int'l Ass'n of Heat and Frost Insulation and Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States* v. *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC*, 282 F. Supp. 39 (E.D.La. 1968), *aff'd* 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 108 (1970); *Cates* v. *Trans World Airlines*, Civ. No. 73-5487 (S.D.N.Y., July 22, 1976) (Brieant, J.).

The Supreme Court provided support for the lower court's position on the question. The Chief Justice in his opinion in *Griggs* states:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." 401 U.S. at 429-30, 91 S.Ct. at 853.

Griggs and the cognate cases all involved the application of the pre-1972 version of Title VII. Nevertheless, their rule applies by analogy to the instant case. As this court has recently held:

> [I]f the plaintiffs allege that [defendants] engaged in activities prior to the effective date [of the 1972 Amendment] which had a continuing discriminatory effect past the effective date, those continuing effects constitute a violation of the Act and give rise to a cause of action. Essentially, it was the obligation of governmental employers after the effective date of the 1972 amendments to examine their past activities to ensure that any discriminatory effects of those activities did not continue in violation of the Act."

Melani v. *Board of Higher Educ. of the City of New York*, 12 EPD ¶ 11,068 at 4962 (S.D.N.Y. 1976) (Gagliardi, J.).

Defendants correctly point to *Monell* v. *Department of Soc. Servs. of the City of New York*, 532 F.2d 259 (2d Cir. 1976) as establishing the circuit rule in respect of the "retroactivity" of Title VII. *Monell* involved a claim by female employees of the New York City Department of Social Services and of the New York City Board of Education that rules and regulations of the city agencies which formerly compelled pregnant employees to take unpaid leaves of absence before medical reasons required any absence were, *inter alia*, violative of Title VII. The court (Metzner, J.) had dismissed the Title VII claims for back pay covering the periods which plaintiffs alleged they could have been working but for the challenged rules. The dismissal was based on the court's determination that the 1972 amendment to Title VII could not be applied retroactively,

and the fact that all the acts of discrimination complained of had occurred prior to the 1972 amendment.[18]

The Court of Appeals affirmed, holding:

> "[T]he 1972 amendment to Title VII does not apply retroactively so as to permit an award of back pay against the city in this case. The same law, Publ.L.No. 92-261, section 2(1) of which amended the definition of 'person' to include 'governments, governmental agencies [and] political subdivisions,' also struck out in section 3 the exemption for the employment of individuals engaged in educational activities of non-religious educational institutions. In *Weise* v. *Syracuse University*, 522 F.2d 397, 410-11 (2d Cir. 1975), we met the question whether Title VII was applicable to discrimination occurring before the lifting of the exemption for educational institutions. We held that it was not retroactive, for it was 'a statute creating new rights where none had previously existed'. . . . We see no valid ground for distinguishing the sex-discrimination claim in *Weise* [here . . . where] entirely new substantive rights were created by the amendment to Title VII."

532 F.2d at 261-62. *See also Cleveland Bd. of Educ.* v. *LeFleur*, 414 U.S. 632, 639 n.8, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Melani* v. *Board of Higher Educ. of the City of New York, supra.*

Monell, however, does not deal with the issue of equitable relief where an employer's post-amendment practice perpetuates and continues pre-amendment discrimination, as is alleged here. It merely limits the Title VII liability of a

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[18] Judge Metzner found that effective January, 1972, the maternity leave policy had been changed.

municipality to damages sustained by victims of discrimination after the 1972 Title VII amendments.

Monell precludes the plaintiffs from recovery of money damages under Title VII which resulted from defendants' unlawful hiring practices. It, does not, however, bar equitable relief made necessary because of pre-amendment discrimination. Indeed, such a bar to equitable relief would run totally counter to the congressional purpose not to effectuate a freeze of employees in positions to which they were relegated by past discrimination predating enactment of the fair employment practices legislation. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 429-30, 91 S.Ct. 849; *Quarles* v. *Philip Morris, Inc.,* 279 F.Supp. 505, 516 (E.D.Va.1968).

b. *Title VII Standard*

In *Griggs* v. *Duke Power Co., supra,* the Supreme Court held that Title VII forbids the use of employment selection practices that have a racially discriminatory impact unless the employer meets "the burden of showing that [the selection practices have] . . . a manifest relationship to the employment in question." *Id.* at 432, 91 S.Ct. at 854. This burden arises only after the complaining party or class has made out a prima facie case of discrimination. The Court held in *Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) that a prima facie case is made out if the complainants can show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425, 95 S.Ct. at 2375. *See also McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). A showing of discriminatory purpose need not be made under Title VII.

Griggs, supra; Albemarle, supra. Based on the evidence adduced at the hearing I find that while the plaintiffs have made a prima facie showing of discrimination, the defendants have not met their burden of showing job-relatedness.[19]

c. *Disproportionate Impact*

At the May 24, 1976, hearing the court ruled that plaintiffs had sustained their burden of establishing that the examinations had a racially discriminatory impact, and that the burden therefore shifted to defendants to show job-relatedness. The following constitutes the court's basis for so ruling.

In the wake of *Guardians I*, the Rand Institute ("Rand") was authorized by all parties to that lawsuit to conduct an independent study to determine the distribution by race of civil service scores on NYCPD entry level examinations # 8046, given July 20, 1968 and/or # 0013, given May 9, 1970. The study was paid for by the City of New York and the Fund of the City of New York.

Rand attempted to determine the respective passing rates of whites, blacks and Hispanics [20] on NYCPD entry level examination # 8046, the earliest examination with an

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[19] Plaintiffs have moved for a preliminary injunction. In order to secure a preliminary injunction, a party must show "(1) probable success on the merits *and* possible irreparable injury *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping directly toward the party requesting the preliminary relief." *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247 (2d Cir. 1973), and cognate cases. While I have not expressly dealt with these prerequisites in the text, it should be quite clear that the decision to grant the preliminary injunction is based on the conclusion that relief is warranted under either test.

[20] *See* Pl's. exh. 1, Rand Report at 14, for the definitions used by Rand of the various racial groups.

eligibility list still in use, and examination # 0013, the latest examination then in use. Both parties to *Guardians I* were aware that these were the only examinations to be studied.[21]

Before Rand could complete such a study it had to determine the race of those applicants who took these examinations. Because the NYCPD did not keep systematic records of the race of the applicants, Rand was forced to rely upon indirect methods of identification. Five different sources of data were used: (1) NYCPD records giving the race of about 30 percent of the applicants taking each examination; (2) results of a questionnaire inquiring into race which was mailed to nearly all persons who took the examinations; (3) a compilation of approximately 8,000 surnames compiled by the U. S. Bureau of Census with which the subjects' names were compared; (4) census tract data, evidencing racal residential concentration with which the subjects' addresses were matched; and (5) a telephone sample of the subjects whose race remained unknown after the NYCPD data and the questionnaire data were on hand.[22]

Using these data, Rand estimated the numbers of whites and blacks who took the examinations in two ways, and the number of Hispanics in three.[23] These estimates, which

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[21] *See* Pl's. exh. 14, letter from Norman Redlich, New York City Corporation Counsel, to Allen Luks of the Rand Institute. Note that defendants expressly stated in this letter that neither the methodology nor the finding of the report would necessarily represent the views of the city. *Id.* at ¶ 6. All parties were, however, kept informed at all times of the methodology that was being used by Rand.

[22] *See* Rand Report, Pl's. exh. 1 at 15-24 for a detailed explanation of the methodology used.

[23] The first method used data from the NYCPD, the questionnaire and the telephone data; the second used data from the census; the third used data involving Hispanic surnames. Rand Report at 25-26.

Rand found to fall well within the range of acceptable statistical error, indicated that about 71 percent of the examinees of both examinations were white, and 29 percent were minority-group members (a larger proportion of this 29 percent were Hispanics for examination # 0013 than for # 8046).

Similarly, Rand used three methods to estimate the distribution by race of the scores on examination # 8046 and # 0013.[24] Under each method the result was substantially the same. Whites consistently passed at higher rates than minorities and consistently comprised the overwhelming majority of individuals in the top deciles. Minorities consistently comprised the overwhelming majority of individuals in the bottom deciles. In summarizing its findings, Rand stated that:

> "[w]e have found substantial and statistically significant differences by race in the distributions of exam scores for whites as compared to blacks and Hispanics for both exam # 8046 and exam # 0013. Blacks and Hispanics scored lower than whites and failed at higher rates—no passing grade could have been set to result in equal proportion of whites and minority-group members passing. These findings were confirmed by three different methods of data analysis." Rand Report at 46.[25]

At the hearing, Dr. Cohen testified that given a racially neutral text the chances of this result occurring were statistically less than one in a billion. Tr. 45-46. Rand Report, Pl's. exh. 1 at vi.

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[24] The first method used data from the NYCPD, the questionnaire and the telephone data; the second used NYCPD and questionnaire data, correcting for differential response rates; and the third used census data. Rand Report at 27-46.

[25] *See* appendix for some of the statistical findings of the Rand Study.

Because of the similarity of results for the studies of the two examinations, which were given two years apart, Rand concluded that it was

> "confident that the patterns observed for exam # 0013 are not unique to that exam but are most likely typical of the patterns for all recent civil service patrolmen's exams."

Rand Report at 38; Testimony of Dr. Cohen, Tr. 47, 48.

Plaintiffs assert that there is additional evidence which supports their claims of racially discriminatory impact.[26] Because the court believes that the results of the Rand Report are sufficient to make out a prima facie case, however, this other evidence need not be considered.[27]

Furthermore, it is unnecessary to determine whether plaintiffs or defendants are correct in their assertions as to the proper makeup of the applicant pool. Plaintiffs seek to prove that minorities are grossly underrepresented in the NYCPD. Defendants contend that the statistics demonstrate otherwise. However, even if the result were overrepresentation of minorities, that would have little relevance to the Title VII issue presented here. All that is challenged in this case is the selection practice that occurs at the point that members of the applicant pool actually show up and take the entry level examinations. Even if, as defendants con-

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[26] *See* Pls. Post-Hearing Memorandum, at 20-24.

[27] Statistical evidence alone is sufficient to establish a prima facie case of discrimination. *See United States* v. *Wood, Wire and Metal Lathers' Union, Local 46*, 471 F.2d 408, 414 n.11 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973); *Kaplan* v. *International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1358 (9th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight Co.*, 505 F.2d 40, 53 (5th Cir. 1974); *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 307 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107, 93 S.Ct 900, 34 L.Ed.2d 687 (1973).

tend, the percentage of minority policemen is nearly equivalent to the percentage of minorities in the relevant applicant pool, the fact remains that utilization of the examinations challenged has had the effect of significantly decreasing what might otherwise be the number of minorities who would, under NYCPD procedures, be eligible for appointment. The key question that must be faced is given the number of whites, blacks and Hispanics who took the NYCPD entry level examinations, whether the number who passed or failed and the scores they achieved were to a legally significant degree determined by their race.[28]

Defendants have at all times contested the statisical basis for the finding of a prima facie case of discrimination. At the May, 1976 hearing they called Professor Alan Gross, an associate professor in the department of educational psychology at the graduate center of City University. Dr. Gross testified that he did not "think any conclusions at all can be drawn from [the Rand] study because of the methodology used. . . ." Tr. 578. Dr. Gross proceeded to analyze each of the methods used by Rand to reach its conclusions and found each severely flawed. In analyzing Rand's use of the census records, for example, Dr. Gross stated:

> "[Rand] looked at a tract, a region. Supposing this region, you find according to census records that 90 percent of all individuals are black and 10 percent are not—this is known from census records—and therefore

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[28] The parties' dispute over the proper applicant pool might, on the other hand, be relevant if the plaintiffs claimed that defendants' recruitment practices were discriminatory. Furthermore, to the extent that these practices are claimed relevant to the issue of discriminatory purpose involved in the constitutional claims—the dispute as to the proper applicant pool *is* relevant. As the discussion, *supra*, indicates, however, plaintiffs have not met their burden of showing discriminatory purpose in respect of the reach of constitutional strictures.

what the authors of the report tried to do was, they looked at one of those people they couldn't contact in the telephone survey, but they knew what tract, census tract this person lived in. They said if this person lives in a census tract that is 90 percent Hispanic, then we can assume that this person is Hispanic and although we might be wrong, 10 percent, that's not an unreasonable rate and we'll call anybody in this census tract, will assume is Spanish.

There is a big problem with that and a flaw in that kind of reasoning. . . . A person from a tract 90 percent Spanish, is Spanish. If a person comes from the tract and is taking the police examination, what are the chances he is Spanish? If a greater proportion of whites apply than do Spanish individuals, then the probability is not .90 more. It goes down considerably." Tr. 591-93.

Dr. Gross was similary critical of the other methods used by Rand in its study. As another example, Dr. Gross stated that there was no theoretical basis to extrapolate from the results of the study of the two examinations a conclusion relating to the results of all the examinations that were given in between. In short, Dr. Gross testified that the Rand report was based on "[a]ssumptions that there is no basis for defending. They may be right and they may be wrong." Tr. 619.

Dr. Gross' opinions are of course quite relevant. I am not persuaded, however, by his arguments. Although the Rand study may be based in minor part on certain unproved assumptions, viewed as a whole its findings are clearly trustworthy. As the report indicates, its authors recognized that they were confronted with certain methodological problems.

Accordingly, they used three different statistical methods in order to ensure that their findings would be accurate. Dr. Gross' criticisms might have been telling had Rand's conclusions been based on only one of the methods used. However, regardless of which of the three statistical methods the authors used, they came up with substantially equivalent results. I have no hesitancy in concluding that this consistency is more than sufficient to remove any doubt as to the reliability of Rand's methods and findings.

My faith in the accuracy of Rand's findings is based additionally on the fact that the Rand study was conducted entirely independently of the parties to this litigation, and that there is nothing whatsoever to indicate that the authors of that study had any desire or predilection to reach a particular conclusion. Moreover, there can be little dispute that the Rand study was conducted in a thoroughly professional manner by experts in the field. Indeed, although the defendants are not estopped from challenging the methodology used by Rand,[29] it is significant that the defendants trusted Rand's technical capabilities sufficiently to authorize its study of the problem in the first place.

In sum, I find that the results of the Rand study are reliable and by themselves are sufficient to establish a prima facie case.

d. *Defendants Have Not Shown the Tests to be Job-Related*

Since plaintiffs have established a prima facie case of discrimination, defendants must shown that the tests in question are job-related. *Griggs* v. *Duke Power, supra; Albermarle Paper Co.* v. *Moody, supra; Chance* v. *Board of*

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[29] *See* footnote 21, *supra.*

Examiners, 458 F.2d 1167 (2d Cir. 1972). To do so, defendants must show that the entry level examinations "are demonstrably a reasonable measure of job performance." *Griggs, supra*, 401 U.S. at 436, 91 S.Ct. at 856.

The parties agree that there are three generally accepted measures of test validation—content, construct and criteria-related validity.[30] Defendants contend that the NYCPD exams are demonstrably validated according to both the content and criteria-related standards.

i. *Content Validity*

In *Vulcan Soc'y of the New City Fire Dep't, Inc.* v. *Civil Serv. Comm'n*, 360 F.Supp. 1265 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973), Judge Weinfeld described content validity:

> "An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills re-

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[30] *See* EEOC Guidelines on Employment Testing Procedures ("EEOC Guidelines"), 29 C.F.R. § 1607.5, which states:

> "§ 1607.5 Minimum standards validation.
>
> (a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street N.W., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication may also be appropriate where criterion-related validity is not feasible. . . ."

The Supreme Court has held in both *Griggs, supra*, and *Albemarle, supra*, that the EEOC Guidelines express the will of Congress in passing Title VII, and are entitled to great deference. *See Jones* v. *New York City Human Resources Administration*, 391 F.Supp. 1064, 1075-76 and cases cited therein (S.D.N.Y. 1975).

> quired for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job."

360 F.Supp. at 1274 (footnotes omitted). *See Jones* v. *New York City Human Resources Administration,* 391 F. Supp. 1064 (D.C. 1975); testimony of Solomon Weiner, Tr. 373, testimony of Dr. Barrett, Tr. 866.

Although generally considered less reliable than criterion-related validation, content validation will satisfy the employer's burden of showing job-relatedness. *Vulcan, supra; Jones* v. *New York City Human Resources Administration, supra;* EEOC Guidelines, *supra,* 29 C.F.R. at § 1607.5(a).

The EEOC has stated that where an attempt is made to demonstrate the content validity of an examination, evidence of validity should be

> "accompanied by sufficient information from job analysis to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) . . . . Evidence of content validity alone may be acceptable for *well-developed* tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job."

EEOC Guidelines, *supra,* 29 C.F.R. at § 1607.5(a) (emphasis added). *See* American Psychological Association Standards ("APA Standards"), E 12.4, Pl's. exh. 3. As defined by Judge Weinfeld, a job analysis is a "thorough

survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill. It is conducted by interviewing workers, supervisors and administrators; consulting training manuals; and closely observing the actual performance of the job.". *Vulcan, supra,* 360 F.Supp. at 1274; *Kirkland* v. *New York State Dep't of Correctional Servs.,* 374 F.Supp. 1361, 1373 (S.D.N.Y. 1974); *Jones* v. *New York City Human Resources Administration, supra,* 391 F.Supp. at 1077. Where an examination is prepared on the basis of a valid job analysis it should be content valid—*i. e.,* test in proper relative measure the key areas of knowledge and ability involved in the actual job for which the examinees are applying. Conversely, where an examination is prepared without benefit of a job analysis, or on the basis of an inaccurate job analysis, it will no doubt lack content validity. Only chance will provide otherwise, and in the absence of a job analysis the burden of persuasion in demonstrating the job-relatedness of a challenged examination becomes even greater than is normally the case. *Vulcan, supra,* 490 F.2d at 395-96; *Jones, supra,* 391 F.Supp. at 1076-77 (unless the job analysis accurately describes the content of the job, the content of the examination is likely to be seriously distorted).

Defendants have never introduced in evidence any formal job analysis, and as I stated at the June 30, 1976 hearing, their failure to do so shall be taken as evidence that no written job analysis was ever prepared. Tr. 465. Nevertheless, defendants contend that the "job-relatedness of [the examination in question] is supported . . . by the method of preparation . . . ." Def's. Mem. at 126. It appears that by this statement defendants are making two assertions: (1) in light of the test preparation procedures they followed,

their failure to conduct a job analysis is irrelevant in respect of the burden of persuasion they must meet; and (2) the test preparation procedures taken were so professional as to constitute proof of job-relatedness, or at least to lessen their burden of presuasion in showing job-relatedness. *See also* Def's. Mem. at 43.

The evidence, however, does not support defendants' position. Solomon Weiner, former director of examinations for the Department of Personnel, testified that the actual preparation of the examinations in issue encompassed review of files of previous tests; review of materials available in the library of the Bureau of Examinations; review of the Patrol Guide rules giving the procedures of the Police Department; contact with the Police Department concerning any special conditions warranting particular attention; the drafting of a notice of examination; and finally the construction of the actual test itself, using the various material described above.[31] While the use of such procedures no doubt indicates a good faith effort to construct a valid test, it cannot compensate in any way for a failure to construct the test based on a proper analysis of a police officer's duties. It is particularly noteworthy that defendants have presented no evidence that the test preparations followed included any regular program of field visitations or observations. Given the absence of such a program, it is impossible for me to

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[31] The actual procedure described by Weiner involved submission of drafts, review and correction of those drafts, and at times referral to "higher authorities" for resolution of disputes that might arise. Tr. 337 *et seq.* Parentheticaly, it is important to note that as Weiner describes this preparation, it appears beyond doubt that defendants prepared the examinations with the goal of predicting which applicants would make the best police officers, and not, as defendants now assert —surely in order to draw the closest possible parallel to *Washington v. Davis, supra*—to predict which applicants would do best at the Academy.

understand how even the most conscientious procedures imaginable could, except fortuitously, supply the crucial information otherwise available through a job analysis, and on which a content valid test must be based. In *Vulcan, supra,* 360 F.Supp. at 1274-76, Judge Weinfeld held a similar test preparation procedure inadequate, and the record in this case provides no basis for a different finding here.

Yet even apart from the issue of inadequate preparation, defendants have failed to present any convincing evidence that the challenged examinations are content valid. Indeed, about the only direct evidence of content validity put forth by defendants at trial was the testimony of Mr. Weiner, who defined content validity and testified that the tests in issue met that standard, but who gave no reason in support of this conclusion. Tr. 372 *et seq.*

In contrast, plaintiffs' witness Dr. Richard S. Barrett, a nationally recognized testing expert, was able to point with specificity to serious deficiencies in the content of the examinations. It appeared to the court that Dr. Barrett's analysis was both better reasoned than Mr. Weiner's and based on a greater expertise in the science of testing. I am aware that Dr. Barrett sets a high standard for test validation;[32] nevertheless, I am convinced by this testimony, certain other evidence in the record and common sense that the challenged examinations not only have not been shown to be content valid, but are in fact lacking in content validity.

In addition to severely criticizing the method of test preparation used by defendants, Dr. Barrett stated that the actual content of the examinations had little relation to the

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[32] Dr. Barrett testified that he had appeared as an expert in 54 or 55 other cases, and in only two instances had testified that the examination in question was valid. Tr. 938-39.

content of the job of police officer.[33] For example, Dr. Barrett testified that the "judgment" questions on the examinations were inappropriate since:

> "there is certainly no reason to believe that a person taking this test will experience the same emotions and really relive the same experience if he were actually confronted with the situation. So what he may say he would do under these circumstances may be vastly different from what he would actually do." Tr. 871.

Yet examinations # 9080, 9049 and 0013 all contained between 20-25 percent or more of such questions (involving hypothetical police situations). *See* Def's. exhs. N, O, P. I note that former NYCPD Commissioner Patrick Murphy also testified that he did not believe such questions tested for the same sort of judgments that a police officer would actually have to make.[34]

Examinations # 0013 and 9049 had approximately 20 percent "civic awareness" questions. Examination # 9080 had approximately 8 percent of such questions. Yet Dr. Barrett testified that "certainly there is no police related behavior that stems directly from the knowledge or the lack of knowledge of that kind of question." Tr. 874. That, no doubt, is completely correct. Indeed, Dr. David Hall, defendants' witness who prepared the 1973 examination

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[33] Dr. Barrett based his testimony on Psychological Corporation's job analysis used to prepare examination # 3014, which defendants assert is valid.

[34] On the other hand, Dr. Hall, defendants' expert, testified that his job analysis for the 1973 examination indicated that judgment questions should constitute 40 percent of the entry level test. Tr. 787. Even if Dr. Hall is correct, and it appears to me that Dr. Barrett and Commissioner Murphy have the stronger position, it is nevertheless the case that the challenged examinations weighted the importance of judgment questions incorrectly, and by a substantial amount.

3014, testified that civic awareness questions were not found important by his job analysis. Tr. 777-78. *See Vulcan, supra,* 360 F.Supp. at 1276.

Examinations # 9049, 9080 and 0013 had 4 percent, 12 percent and 20 percent of their questions in the area of space and figure relations. Dr. Barrett testified that these questions had little to do with what a police officer does on his job. Tr. 876-77. Dr. Hall testified that he "would not say [these areas were] unrelated to the job, but in [the Psychological Corporation's] opinion [they] did not warrant being included in the test." Tr. 781. Dr. Hall also testified that the same was true as far as "coding" questions were concerned. *Ibid.* Dr. Barrett again testified that such questions did not test for the content of a police officer's job. Tr. 877. Yet examination # 9080 included 6 percent "coding" questions. *See* Def's. exh. O.

It is clear that this evidence falls short of demonstrating content validity, which is the burden defendants must meet.[35] Defendants contend, however, that they have shown indirectly what they have failed to demonstrate directly. They assert that the content of the pre-1973 examination is substantially equivalent to the content of examination # 3014,[36] and since the latter examination is content valid, the earlier examinations must be as well. Assuming

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[35] In their memorandum, at 120, defendants argue in part that plaintiffs have not demonstrated that the NYCPD examinations are unrelated to the position of police officer. Plaintiffs need not make such a demonstration, however. The burden rests on the defendants to show that the examinations *are* job-related.

[36] Examination # 3014 was given in 1973. Plaintiffs do not challenge its legality in this action. On the other hand, neither do they concede its validity.

arguendo the content validity of # 3014, however, defendants' argument remains unpersuasive.[37]

No doubt in part because of the significant change in test preparation procedure,[38] the content of the later test varies substantially from that of the earlier tests. For example, the test plan for examination # 3014 prepared by the Psychological Corporation in its Phase I Report suggests the following weighting in the written test:

Test Content	*Number of Items*
Judgment in Police Situations	40-45
Understanding of Written Materials & Diagrams Reading comprehension Completion of forms Diagrams	35-40
Observational Skills Recognition of faces Recall of Significant Details	15-20
Basic Arithmetic Skills Counting and Dial Reading Basic operations Time Problems	5-10

[37] The court makes no finding as to whether examination # 3014 is or is not content valid. Dr. Hall, who prepared the examination, testified that it is content valid. Dr. Barrett testified at first that the examination was not content valid, but on cross-examination modified his testimony and stated that he could not be certain whether # 3014 is or is not content valid.

[38] The most important difference is that Psychological Corporation, after making a six month study of the job of police officer, prepared a job analysis. *See* Dr. Hall's testimony for a full description of the test preparation used in respect of examination # 3014. Tr. 734 *et seq.*

Def's. exh. R. On the other hand, the test plan for examination # 0013, for example, gives a totally different picture of the areas in which applicants should be tested:

Test Content	*Relative Emphasis*
Perception	20%
General Aptitude (Verbal 20%) (Arithmetic 20%)	40%
Social Sensitivity	20%
Awareness of Urban Problems	20%

Pl's. exh. 25.

Inspection of other of the challenged examinations and their test plans shows not only a similar difference in testing content between them and examination # 3014, but also a substantial difference in testing content among themselves. *See, e. g.,* Pl's. exhs. 27A-N, 23, 24. This evidence is insufficient under Title VII standards. Accordingly, I find that the defendants have not demonstrated that the challenged examinations are content valid.

ii. *Criteria-Related Validity*

Defendants argue that they have submitted sufficient evidence to validate the challenged examinations according to the criteria-related (or "predictive") method of test validation.

Criteria-related validity studies correlate test performance with job performance. Tr. Barrett at 889; Weiner at 379; Hall at 761. When a test that is validated by a criteria-related method is employed, the examinees who achieve the highest (or lowest) scores should also be those who will be the better (or worse) employees. *See* APA Standard, *supra,* at 26 *et seq.*

Defendants point to a validity study prepared by Dr. William Weichun ("Weichun study"), a researcher at the New York City Board of Education. The purpose of this study was to determine the relationship between the NYCPD entry level examinations and academic success at the NYC Police Academy ("the Academy"). Tr. 835. Dr. Weichun found that the examinations employed between 1968 and 1970 were "very good predictor[s] of success at the police academy." Tr. 839-40. Dr. Weichun also found that the tests were equally predictive for whites, blacks and Hispanics. *Ibid.*

Plaintiffs do not contest the findings of Dr. Weichun.[39] Rather, plaintiffs contend that the study does not constitute evidence of criteria-related validity. Had Dr. Weichun's study revealed a high correlation between results on the challenged examination and job performance, then presumably the Title VII claim would fail, as predictive validity would have been proved.[40] The correlation shown here, however, was not between test scores and job performance, but between test scores and performance at the Academy. There was no attempt to correlate performance at the Academy and performance on the job.[41] Relying on the

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[39] Plaintiffs do, however, assert that the study was hastily done to draw a parallel to *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), discussed *infra*.

[40] I say "presumably", since plaintiffs would probably challenge Dr. Weichun's methodology if the result were as hypothesized in the text. The court assumes for the purposes of this case, however, that his methodology was sound.

[41] Indeed, former Commissioner Murphy testified that he did not believe there was a strong correlation between performance at the Academy and performance on the job. Tr. 1100-01. Even Captain Lawlor, who disagreed in general with this statement, stated that job performance was sometimes a problem for candidates who did well on academy examinations, but who related poorly to the communities in which they worked. Tr. 720-21.

Supreme Court's recent decision in *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), defendants assert that such a showing is unnecessary, and that the Weichun study is sufficient under the law of that case to show job-relatedness. I disagree.

In *Vulcan, supra*, 490 F.2d at 396, the Second Circuit disapproved of a contention similar to that asserted here by defendants. The court stated there that without a showing that performance at training school correlated with performance on the job, demonstration of a high correlation between entry level test scores and training school performance meant little.[42] *Accord, Commonwealth of Pennsylvania* v. *O'Neill*, 348 F.Supp. 1084, 1090 (E.D.Pa. 1972), *aff'd in pertinent part*, 473 F.2d 1029 (3rd Cir. 1973); *United States* v. *Chicago*, 385 F.Supp. 543, 555-56 (N.D.Ill. 1974); *Officers for Justice* v. *Civil Serv. Comm'n*, 371 F.Supp. 1328, 1337 (N.D.Cal. 1973); *Smith* v. *East Cleveland*, 363 F.Supp. 1131, 1148-49 (N.D.Ohio 1973), *aff'd in part and rev'd in part on other grounds*, 520 F.2d 492 (6th Cir. 1976); *Harper* v. *Mayor and City Council*, 359 F.Supp. 1187, 1202-03 (D.Md.), *modified and aff'd*, 486 F.2d 1134 (4th Cir. 1973).

The reasoning of the Second Circuit in *Vulcan* is applicable to this case. Defendants' study demonstrates a

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[42] In footnote 11 of its opinion, the court stated:

> The danger of distortion in this regard is particularly acute, since performance in the probationary school is also evaluated by means of a written examination. Thus, there is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job-related, such a demonstration is barren indeed." 490 F.2d at 396.

high correlation between performance on the challenged examinations and performance at the Academy, but the task of correlating the examinations to actual performance as police officers remains unaccomplished. The respective positions of the parties would be unchanged if, for example, instead of giving these entry level examinations the NYCPD had enrolled the same group of individuals in the Academy. Because of the established correlation, standing on completion of training at the Academy would, presumably, approximate standing achieved at the entry level examinations. That is to say, a consistently higher proportion of whites than minorities would achieve passing grades, and a large majority of the highest achievers would be white. Accordingly, the greatest number of Academy graduates first hired would be white, and the greatest number of those first fired would be Academy graduates who are black and Hispanic. In a Title VII attack in that situation, plaintiffs' prima facie case would be established by showing, as here, the disproportionate impact of Academy procedures and testing on minorities. Defendants would be required to demonstrate that those testing practices are job-related, as they are required here to do in respect of the entry level examination. By introducing Academy performance as a correlate to the examinations, defendants cannot avoid their obligation to show job-relatedness.

To provide that missing ingredient defendants would have this court find job-relatedness on the basis of a high correlation between the results of two separate testing practices, neither of which by itself has been validated according to accepted methods. We cannot accept this flawed argument.

Defendants seek support for their contention in the Supreme Court decision in *Washington* v. *Davis, supra.* Reliance on *Washington,* however, is surely misplaced.

In *Washington*, two blacks whose applications to become police officers in the District of Columbia had been rejected, were permitted to intervene in a suit that challenged the promotion policies of the D.C. Police Department. They asserted that the Department's recruiting practices, which included the giving of a written test ("Test 21"), violated their rights under the due process clause of the Fifth Amendment, 42 U.S.C. § 1981 and D.C.Code § 1-320. The intervenors (respondents in the Supreme Court but referred to here as plaintiffs) moved for partial summary judgment on the recruitment phase of the case, seeking a declaration that Test 21 unlawfully discriminated against minorities in violation of the Fifth Amendment. The defendants (petitioners in the Supreme Court) filed a counter motion for summary judgment, asserting that plaintiffs were entitled to relief on neither constitutional nor statutory grounds.

The district court granted the defendants' motion. *Davis* v. *Washington*, 348 F.Supp. 15 (D.C. 1972). The court found, *inter alia*: (1) there was no claim of a racially discriminatory purpose, but only a claim that Test 21 had a racially discriminatory impact; (2) a higher proportion of blacks than whites failed Test 21; (3) Test 21 had not been validated to establish its reliability for measuring job performance. *Id.* at 16. These findings were held sufficient to shift the burden to defendants to show the job-relatedness of Test 21. The court found that they had met that burden, as "the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither designed nor operates to discriminate against otherwise qualied blacks," *Id.* at 17. Most importantly for the purposes of this case at least, the court held that the defendants were entitled to summary judgment even though Test 21

had not been validated as to subsequent job performance. It was sufficient to show validation as to performance at recruit school. *Id.* at 18.

On appeal, the court of appeals reversed. 168 U.S.App. D.C. 42, 512 F.2d 956 (1975). That court held that in resolving the constitutional claim it would be guided by the Title VII principles established in *Griggs* v. *Duke Power Co., supra,* and determined that (1) it was irrelevant whether plaintiffs had shown any evidence of a racially discriminatory purpose; and (2) absent proof by defendants that Test 21 had been validated in regard to job performance, defendants had not rebutted the plaintiffs' showing of Test 21's racially discriminatory impact. 512 F.2d at 960.

The court of appeals' decision was in turn reversed by the Supreme Court. In an opinion written by Justice White, the Court held that the court of appeals had erred in applying Title VII standards to Fifth Amendment claim of discrimination. *See* discussion *supra.*

In part III of its opinion the Court considered the statutory issues raised by the summary judgment motion. Although Justice White does not explicitly state exactly what statutory issues the Court has in mind, and this does create some confusion, it is reasonably clear from a reading of the full opinion that the statutory holdings in *Washington* are limited to 42 U.S.C. § 1981 and § 1-320 of the District of Columbia Code.[43] No other interpretation makes sense.

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[43] Both 42 U.S.C. § 1981 and D.C.Code § 1-320 were raised in respondents' amended complaint as bases for a finding of a violation of their rights. 426 U.S. at 233, 96 S.Ct. 2040. As the Court notes, *id.,* at n. 2, 96 S.Ct. 2040, 5 U.S.C. § 3304(a)—which provides certain rules concerning the giving of competitive examinations for testing applicants for appointment in the competitive service—is also relevant to the statutory issues in *Washington,* since it is made expressly applicable to the District of Columbia police force by D.C. Code § 4-103.

The Court explicitly states that no Title VII issue is raised by *Washington*, 426 U.S. at 238, n. 10, 96 S.Ct. 2040. *See also* Justice Stevens' concurring opinion, *id.* at 255, 96 S.Ct. 2040. As far as the statutory issues were concerned, the Court held that respondents had no better claim under the statutes involved than they had under the Fifth Amendment. Justice White wrote:

> "The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands and attempting to impart a modicum of skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training [school] performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training performance validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge and by the current views of the Civil Service Commissioners who were parties to the case. Nor is the conclusion foreclosed by either *Griggs* or *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); and it seems to us the much more sensible construction of the job-relatedness requirement."

426 U.S. at 250-51, 96 S.Ct. at 2053. The Court was not convinced that the trial court's finding that Test 21 was directly related to the requirements of the police training program was erroneous. *Id.* at 251-52, 96 S.Ct. 2040.

Contrary to defendants' assertions, *Washington* does not preclude this court from determining that they have not met the burden imposed on them by Title VII of showing the job-relatedness of the examinations at issue.

First, all the Court held in part III of its opinion was that, under the proper construction of the non-Title VII statutes applicable to the case, the lower court was entitled to find Test 21 to be a valid test once it found the test directly related to the requirements of the police training program. The Court's statement that this conclusion is not "foreclosed" by either *Griggs* or *Albermarle,* is full consistent with this interpretation, since these cases involved the stricter validation standards of Title VII. Both Justice Stevens in his concurrence, 426 U.S. at 255-56, 96 S.Ct. 2040, and Justice Brennan in his dissent, *id.* at 257, 96 S.Ct. 2040, support my reading of the case.

Furthermore, as Justice Stevens points out, the EEOC Guidelines on Employment Procedures, 29 C.F.R. § 1607, *see* discussion *supra,* are not applicable to either 42 U.S.C. § 1981 or D.C.Code § 1-320, the statutes to which the Court's holding in part III was limited. These very guidelines, however, which require that a criteria-related validity study show a positive relationship between the challenged test and actual job performance, were an essential ingredient in *Griggs* and *Albermarle, supra.* Thus *Washington* does not in any way preclude a court in a purely Title VII case such as this, where the guidelines are applicable,[44] from holding that job performance validation is necessary.

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[44] As support for its conclusion that training program validation was sufficient in *Washington,* the Court at 426 U.S. at 250, n. 16, 96

Second, there is a crucial difference between Test 21 in the *Washington* case and the examinations challenged here. Test 21 is not used in an attempt to predict whether applicants will subsequently become good police officers. Rather, Test 21 is an examination administered generally throughout the federal service that tests an applicant's reading and verbal ability. *Washington, supra,* 426 U.S. at 234-35, 96 S.Ct. 2040. It is used to insure that potential recruits for the police department (and indeed for other branches of the federal service) have the minimal amount of reading and verbal skills necessary for training purposes. *Id.* at 235, 96 S.Ct. 2040; Memorandum in Support of defendants Hampton, Spain and Andolsek's motion for summary judgment, 426 U.S.Briefs 229, at 97 (1976).

This case involves a totally different type of test. The challenged NYCPD examinations are not used merely to

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S.Ct. at 2053, set out the pertinent part of the current instructions of the Civil Service Commission on "Examining, Testing, Standards and Employment Practices." These instructions state that "an appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as: (a) Effective job performance; (b) Capability; (c) Success in training; (d) Reduced turnover; or (e) Job satisfaction." Immediately thereafter, the Court stated: "see also Equal Employment Opportunity Commission Guidelines . . . . 29 C.F.R. § 1607.5(b)(3) . . ." *Id.* at 251, 96 S.Ct. at 2053. The Court's reference to the EEOC Guidelines using the introductory signal "see also" (as defined in A Uniform System of Citation, p. 7 (12th Ed. 1976), "see also" means: "cited authority provides background to a question analogous to that examined in text, which can profitably be compared with it."), should not, presumably, be taken to imply that the Guidelines provide for the same standards of test validation as the quoted Civil Service instructions. Indeed, in stating that "criteria of employee adequacy" may include "measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure," the Guidelines also state that "[w]hatever criteria are used they must represent major or critical work behaviors as revealed by careful job analysis." 29 C.F.R. § 1607.5(b)(3).

screen out individuals whose verbal and reading proficiencies fall below those necessary for training purposes. They were clearly designed and used to predict which applicants would ultimately become the best police officers, and to eliminate from consideration those applicants who, based on the test results, would become the worst officers. In other words, they were designed to predict performance on the job, not trainability. Defendants attempt to skirt this fact by proffering evidence of the need for police officers of high intelligence. Yet, even if an applicant's score is indicative of the level of his general intelligence, that is clearly only an accidental and unplanned result of the use of the examinations. In any event, the plaintiffs in this case are all individuals who have passed the challenged examinations, and who therefore possess the minimum abilities that defendants contend are necessary for good police work and for which they contend the examinations test. Unlike *Washington*, plaintiffs' complaint is based not on the use of the NYCPD examinations for initial screening purposes, but rather on their use for ranking purposes, with the result that a disproportionately large percentage of those hired last and fired first are minorities.[45]

Defendants' invocation of *Washington* is, therefore, unavailing. Accordingly, the court holds that the defendants have failed to demonstrate that the challenged tests are job-related under the criteria-related method of validation.

The Height Requirement

Plaintiffs' challenge to the 67 inch height requirement focuses primarily on whether defendants have complied with

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[45] In the recent layoffs, 9.8% of the white police officers were laid-off. In sharp contrast, 18% of the black officers were laid-off, and 22% of the Hispanic officers were laid-off. *See* Pl's. exhs. 12, 13.

Title VII. They make no showing that defendants employed a height requirement with an invidiously discriminatory purpose, as is required to make out a claim under the Fourteenth Amendment, § 1981 or § 1983. *Washington* v. *Davis, supra.* The use of height requirements is a well-established practice among law enforcement agencies throughout the country.[46] In a large sample of the nation's police departments, 97 percent had some minimum height requirements for male officers in 1973, with the average minimum requirement being 68 inches.[47] Indeed, in light of the traditional, accepted and wide-spread use of height requirements as requisites for law enforcement employment, the court would be hard-pressed to find an express discriminatory purpose in this case. Furthermore, during the examination periods under consideration, the contrary is demonstrated by the fact that the minimum height requirement for police officers was lowered from 5'8" to 5'7" with

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[46] Some commonly advanced arguments in support of minimum height standards are: (1) strength is related to height, C. Morgan, ed., *Human Engineering Guide to Equipment Design,* at 557 (1963) as cited in R. Hoobler & J. McQueeney, "A Question of Height," *Police Chief,* Nov., 1973 at 48; (2) taller officers have a psychological advantage, *see Smith* v. *Troyan,* 520 F.2d 492, 496 (6th Cir. 1975); (3) the visibility of taller officers is an asset in crowd control, F. Verducci, "Height and Weight Requirements for Police Officers," submitted to the Civil Serv. Comm'n., City and County of San Francisco; (4) many adult males find small body size a threat to self-esteem and tend to depreciate their own personal worth as a result of this perception. E Gunderson, "Body Size, Self-Evaluation and Military Effectiveness," 2 *J. of Personality and Soc. Psych.,* No. 6 at 902-06 as cited in R. Hoobler & J. McQueeney, *id.* at 48; and (5) shorter officers are more likely to be assaulted, *id.* at 46, 48. *See also,* T. White & P. Bloch, *Police Officer Height and Selected Aspects of Performance,* Police Foundation, et al., at 2 (1975).

[47] T. Eisenberg, D. Kent & C. Wall, *Police Personnel Practices in State and Local Governments, Int'l Ass'n of Chiefs of Police, et al.* (1973).

the hope that this would increase the number of Hispanics on the force.

Nor is the NYCPD's voluntary suspension of the height requirement in 1973 indicative of earlier discriminatory intent. In March, 1973, the Justice Department for the first time required police departments receiving federal funds to comply with EEOC Guidelines on employment selection procategories. Because the defendant department concluded that it should conduct its own study [49] to show the correlation between height and job performance rather than rely on other studies and opinions, it eliminated the height requirement prospectively for the 1973 examination. In point of fact, the department's elimination of the height requirement in 1973 in order to conduct its own study may be more probative of good faith than of discriminatory intent.

However, with respect to the Title VII claim, plaintiffs have introduced evidence tending to show that most Hispanics could not meet the height requirement imposed by the NYCPD and that therefore, the requirement had a disproportionate impact on Hispanics.[50] Defendants have not met the burden of justification which under Title VII is required.

The pervasive use of height standards observed earlier bespeaks a widespread belief among law enforcers that the

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[48] 29 C.F.R. § 1607.1-14.

[49] The validation study was never completed because the layoffs in 1975 eliminated the pool of shorter officers needed for comparison with officers meeting the height requirement.

[50] For this assertion, plaintiffs rely on "Height of American Male Youths of Military Age by Race, Ethnic Group and Selected Geographic Areas, Fiscal Year 1972," prepared for the Office of the Ass't Sec'y of Defense. This report classified people as "Spanish" solely on the basis of their surnames. *Id.* at 1, 3. The age range in

height of a police officer has an important effect on his job performance. These views, however, have recently come under attack and their validity has been seriously questioned. The fact that the use of height requirements are a time-honored or widely-accepted practice does not automatically save it from a claim of discrimination. As has been seen in the areas of race and sex discrimination, long-accepted stereotypes too often help perpetuate discriminatory practices even though they have no basis in fact. The federal government has demonstrated its concern that height requirements not be improperly used to exclude minority groups from employment as law enforcement personnel. EEOC Guidelines, 29 C.F.R. § 1606.1(b)[51] In order to defend a minimum height standard successfully, defendants have to show that it was actually job-related. This they have failed to do.

As conceded by defendants, an analysis of recent studies of height requirements conducted by the NYCPD revealed "major methodological weaknesses or insufficient data" which made the findings of these studies at best inconclusive. Def's. exh. E. *See also* testimony of Ingrid Balady, Tr. 212. One study referred to in defendants' post-trial memo-

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this study was 17 through 26 years of age. This is roughly comparable to the age range of NYCPD applicants, *i. e.*, 21 through 29. It was found that a required standard height of 67 inches (NYCPD's height requirement during the period under consideration) would eliminate 54.5 percent of the Spanish youths in New York and New Jersey as compared with only 19.1 percent for whites and 22.1 percent for blacks. *Id.* at 2 (Table 4 and the accompanying graph, on which these figures are purportedly based, seem to indicate that the impact on Hispanics is even more disproportionate).

[51] In *Griggs* v. *Duke Power Co., supra,* the Supreme Court noted that the EEOC's Guidelines interpreting the Act according to the mandate of 42 U.S.C. § 2000e-12(a) were "entitled to great deference." *Id.,* 401 U.S. at 433-34, 91 S.Ct. 849.

randum concluded that height differences in two departments surveyed (Nassau County, New York and Dallas, Texas)have, with one exception, had no statistically significant effect upon performance.[52] Its findings were most persuasive.

Federal courts in other Title VII race and sex discrimination cases have found that height was not a valid occupational qualification. *See Mieth* v. *Dothard,* 418 F.Supp. 1169 (M.D.Ala. 1976); *League of United Latin Am. Citizens* v. *City of Santa Ana,* 410 F.Supp. 873 (C.D.Cal. 1975); *Officers for Justice* v. *Civil Serv. Comm'n,* 395 F. Supp. 378 (N.D.Cal. 1975); *Hail* v. *White,* 8 EPD ¶ 9637 (N.D.Cal. 1973); *but see Smith* v. *Troyan,* 520 F.2d 492 (6th Cir. 1975).[53] We have been given no rational basis for validating such a requirement here. In sum, defendants have not satisfied Title VII yardsticks in respect of a 67 inch minimum height requirement; accordingly, they are held to have violated Title VII.

Plaintiffs' motions for certification of a plaintiff class and for a preliminary injunction with respect to both the entry level examinations and the height requirement are granted. The foregoing shall constitute the court's findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

IT IS SO ORDERED.

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[52] T. White & P. Bloch, *Police Officer Height and Selected Aspects of Performance, Police Foundation, et al.* at 6 (1975).

[53] While the court in *Smith* v. *Troyan* held that the district court "erred in finding no 'rational support' for the height requirement," 520 F.2d at 496, the case is distinguishable. The decision in *Smith* was based on a record where the testimony of three police officers in support of the need for a height requirement went uncontradicted. Moreover, the court felt it significant to note that no Title VII claim was asserted; nor was the court faced with a racial challenge to the height requirement.

APPENDIX

A careful reading of the Rand Report, Pl's. exh. 1, will make clear the disproportionate racial impact of the challenged examinations. The following tables—lifted directly from the Report—are provided here for the convenience of those who do not have ready access to the record in this case.

Table 4

EXAM 0013

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

		White		Black		Hispanic		Total	
Decile	Score	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	574	12.8	34	3.5	19	2.3	627	10.0
2	92-94	548	12.2	44	4.6	34	4.2	626	10.0
3	89-92	514	11.5	54	5.6	59	7.2	627	10.0
4	87-89	535	11.9	67	6.9	24	2.9	626	10.0
5	84-87	484	10.8	74	7.7	69	8.4	627	10.0
6	80-84	473	10.6	101	10.4	52	6.4	626	10.0
7	76-80	426	9.5	126	13.0	75	9.2	627	10.0
8	70-76	376	8.4	131	13.5	119	14.5	626	10.0
9	61-70	335	7.5	130	13.4	162	19.8	627	10.0
10	0-61	216	4.8	206	21.3	205	25.1	627	10.0
Pass	75-100	3670	81.9	527	54.5	372	45.5	4569	72.9
Fail	0-74	811	18.1	440	45.5	446	54.5	1697	27.1
Total		4481	100.0	967	100.0	818	100.0	6266	100.0
Average score		84.9		75.3		73.0		81.8	

NOTE: Counts and percents are subject to sampling errors as shown in Table 5.

Table 5

EXAM 0013

95% CONFIDENCE INTERVALS FOR ESTIMATES
OF EXAM SCORE DISTRIBUTION

	Whites		Blacks		Hispanics	
Decile	Number	Percent	Number	Percent	Number	Percent
1	552- 590	12.0-13.5	18- 56	1.7- 6.3	19- 54	2.1- 7.3
2	522- 573	11.4-13.1	27- 65	2.6- 7.4	23- 52	2.6- 7.0
3	480- 549	10.5-12.6	33- 78	3.1- 8.9	32- 87	3.6-11.7
4	507- 564	11.1-12.9	37- 96	3.5-10.9	24- 56	2.7- 7.5
5	457- 511	10.0-11.7	53- 94	5.0-10.7	50- 90	5.6-12.1
6	442- 504	9.6-11.5	73- 129	6.9-14.7	41- 68	4.6- 9.2
7	394- 457	8.6-10.4	98- 155	9.3-17.7	60- 94	6.7-12.7
8	333- 418	7.3- 9.6	97- 166	9.2-18.9	84-153	9.4-20.6
9	290- 373	6.3- 8.5	98- 162	9.3-18.5	126-199	14.1-26.8
10	174- 300	3.8- 6.8	167- 244	15.8-27.8	136-274	15.2-36.9
Pass	3580-3760	78.1-86.0	447- 607	42.4-69.2	316-428	35.3-57.7
Total	4372-4586	100.0	877-1054	100.0	742-896	100.0

Table 6

EXAM 8046

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	365	12.8	26	3.3	14	3.5	405	10.0
2	90-96	358	12.5	40	5.0	8	2.0	406	10.0
3	86-90	343	12.0	42	5.3	20	5.1	405	10.0
4	82-86	340	11.9	54	6.8	12	3.0	406	10.0
5	78-82	305	10.7	69	8.6	31	7.8	405	10.0
6	73-78	296	10.3	65	8.1	45	11.4	406	10.0
7	69-73	270	9.4	102	12.8	33	8.4	405	10.0
8	63-69	222	7.8	126	15.8	58	14.7	406	10.0
9	56-63	251	8.8	104	13.0	50	12.7	405	10.0
10	29-56	112	3.9	170	21.3	124	31.4	406	10.0
Pass	75+	1932	67.5	280	35.1	119	30.1	2333	57.5
Fail	< 75	930	32.5	518	64.9	276	69.9	1722	42.5
Total		2862	100.0	798	100.0	395	100.0	4055	100.0
Average score		80.0		68.9		65.9		76.4	

NOTE: Counts and percents are subject to sampling errors as shown in Table 7.

Table 7

EXAM 8046

95% CONFIDENCE INTERVALS FOR
EXAM SCORE DISTRIBUTION

Decile	Whites		Blacks		Hispanics	
	Number	Percent	Number	Percent	Number	Percent
1	344- 383	11.7-13.8	14- 44	1.6- 6.1	8- 28	1.8- 8.2
2	333- 378	11.3-13.6	19- 64	2.2- 8.8	8- 35	1.8-10.2
3	321- 367	10.9-13.2	24- 63	2.8- 8.7	14- 33	3.1- 9.6
4	322- 355	10.9-12.8	38- 71	4.2- 9.8	11- 38	2.5-11.1
5	287- 327	9.8-11.7	51- 86	5.8-11.9	23- 42	5.1-12.3
6	268- 321	9.1-11.5	45- 86	5.2-11.9	25- 65	5.6-19.0
7	241- 300	8.2-10.8	75-130	8.6-18.0	20- 48	4 14.0
8	189- 253	6.4- 9.1	96-155	11.0-21.4	36- 81	8.1-23.7
9	220- 282	7.5-10.1	76-132	8.7-18.2	30- 70	6.7-20.5
10	84- 139	2.9- 5.0	140-200	16.1-27.6	94-153	21.0-44.7
Pass	1886-1978	64.1-71.1	237-322	27.2-44.5	88-150	19.7-43.9
Total	2763-2942	100.0	724-872	100.0	342-447	100.0

Table 8

EXAM 8046

ESTIMATED EXAM SCORE DISTRIBUTIONS BY RACE
DATA FROM PD AND QUESTIONNAIRES ONLY

		White		Black		Hispanic		Total	
Decile	Score	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	358	12.9	17	2.3	30	5.4	405	10.0
2	90-96	359	12.9	19	2.6	28	5.1	406	10.0
3	86-90	355	12.8	25	3.5	25	4.5	405	10.0
4	82-86	334	12.0	49	6.8	23	4.1	406	10.0
5	78-82	282	10.2	97	13.3	26	4.7	405	10.0
6	73-78	295	10.6	66	9.1	45	8.1	406	10.0
7	69-73	197	7.1	107	14.8	101	18.2	405	10.0
8	63-69	196	7.1	115	15.9	95	17.1	406	10.0
9	56-63	227	8.2	81	11.2	97	17.5	405	10.0
10	29-56	171	6.2	149	20.6	86	15.5	406	10.0
Pass	75+	1910	68.9	257	35.4	166	29.9	2333	57.5
Fail	< 75	864	31.1	468	64.6	390	70.1	1722	42.5
Total		2774	100.0	725	100.0	556	100.0	4055	100.0

Assumption used in deriving table:

The rate of response to the questionnaire by blacks was 91 percent higher than for whites, and the response rate for Hispanics was 11 percent higher than for whites.

Table 9

EXAM 8046

HISPANIC COUNT BY SURNAME CHECK

Decile	Score	Count	Percent of Total Hispanics	Percent of Subjects in Score Range
1	96-100	10	2.7	2.4
2	90-96	11	3.0	2.7
3	86-90	25	6.8	6.2
4	82-86	16	4.4	3.9
5	78-82	32	8.8	7.9
6	73-78	30	8.2	7.4
7	69-73	45	12.3	11.1
8	63-69	58	15.9	14.3
9	56-63	61	16.7	15.1
10	29-56	77	21.1	19.0
Pass	75+	115	31.5	4.9
Fail	< 75	250	68.5	14.5
Total		365	100.0	9.0

Table 10

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM POLICE DEPARTMENT AND QUESTIONNAIRES ONLY
(EXCEPT SURNAME MATCH USED FOR HISPANICS)

		White		Black		Hispanic		Total	
Decile	Score	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	573	12.7	29	2.9	25	3.3	627	10.0
2	92-94	546	12.1	40	4.0	40	5.3	626	10.0
3	89-92	532	11.8	55	5.5	40	5.3	627	10.0
4	87-89	552	12.2	42	4.2	32	4.2	626	10.0
5	84-87	486	10.8	80	8.0	61	8.1	627	10.0
6	80-84	473	10.5	93	9.3	60	8.0	626	10.0
7	76-80	442	9.8	104	10.4	81	10.8	627	10.0
8	70-76	386	8.6	138	13.8	102	13.5	626	10.0
9	61-70	319	7.1	179	17.9	129	17.1	627	10.0
10	0-61	202	4.5	242	24.2	183	24.3	627	10.0
Pass	75+	3712	82.3	482	48.1	375	49.8	4569	72.9
Fail	< 75	799	17.7	520	51.9	378	50.2	1697	27.1
Total		4511	100.0	1002	100.0	753	100.0	6266	100.0

Assumption used in deriving table:

Response rate by blacks to questionnaire was 51 percent higher than for whites.

Table 11

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)
FOUR BOROUGHS COMBINED

	Excluding Hispanic Surname		Including All Subjects		
Decile	White	Black	White	Black	Hispanic
1	13.8 ± 1.3	2.3 ± 1.5	14.4 ± 1.4	2.7 ± 1.8	1.7 ± 2.5
2	11.7 ± 1.2	3.8 ± 1.7	12.3 ± 1.3	3.5 ± 1.9	3.8 ± 2.8
3	12.1 ± 1.2	4.3 ± 1.7	12.3 ± 1.3	5.7 ± 2.2	3.2 ± 2.8
4	12.4 ± 1.2	3.4 ± 1.6	12.0 ± 1.3	2.4 ± 1.8	7.2 ± 3.1
5	11.2 ± 1.2	7.0 ± 2.0	11.6 ± 1.3	8.1 ± 2.6	5.3 ± 3.1
6	10.5 ± 1.2	7.5 ± 2.1	10.7 ± 1.2	8.7 ± 2.6	6.0 ± 3.2
7	9.5 ± 1.1	12.8 ± 2.5	9.1 ± 1.2	10.2 ± 2.9	14.4 ± 4.0
8	8.0 ± 1.0	16.1 ± 2.8	7.8 ± 1.1	14.3 ± 3.3	17.0 ± 4.3
9	6.1 ± 0.9	21.1 ± 3.0	5.9 ± 1.0	22.1 ± 3.7	15.9 ± 4.4
10	4.7 ± 0.8	21.6 ± 3.0	4.1 ± 0.9	22.2 ± 3.8	25.6 ± 4.8
Pass	83.4 ± 1.4	45.7 ± 3.8	84.5 ± 1.6	45.5 ± 4.7	46.2 ± 5.9
Fail	16.6 ± 1.4	54.3 ± 3.8	15.5 ± 1.6	54.5 ± 4.7	53.8 ± 5.9

NOTE: Numbers after ± give 95% confidence intervals. Portions of range lying below zero may be ignored.

Table 12

EXAM 8046

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)
FOUR BOROUGHS COMBINED

Decile	Excluding Hispanic Surname		Including All Subjects		
	White	Black	White	Black	Hispanic
1	12.5 ± 1.5	3.6 ± 1.8	12.6 ± 1.6	2.8 ± 2.1	5.6 ± 3.8
2	12.2 ± 1.5	4.2 ± 1.8	12.1 ± 1.6	3.6 ± 2.2	6.8 ± 4.1
3	12.0 ± 1.5	4.4 ± 1.9	11.3 ± 1.6	3.6 ± 2.3	10.8 ± 4.3
4	11.9 ± 1.5	7.6 ± 2.2	12.6 ± 1.6	8.2 ± 2.7	3.5 ± 3.8
5	10.0 ± 1.4	10.1 ± 2.4	10.0 ± 1.5	12.3 ± 3.0	6.5 ± 4.2
6	9.7 ± 1.3	10.5 ± 2.4	9.2 ± 1.7	11.1 ± 3.4	11.1 ± 4.8
7	10.0 ± 1.5	7.7 ± 2.6	10.5 ± 1.8	6.9 ± 3.4	9.5 ± 5.0
8	8.4 ± 1.4	14.7 ± 3.2	9.1 ± 1.7	15.8 ± 4.8	10.9 ± 5.5
9	8.2 ± 1.4	13.7 ± 3.1	8.5 ± 1.6	13.0 ± 4.4	13.7 ± 5.9
10	4.9 ± 1.1	23.5 ± 3.7	4.2 ± 1.2	23.0 ± 5.8	21.1 ± 7.1
Pass	65.9 ± 2.8	37.8 ± 4.4	65.1 ± 3.5	38.0 ± 10.2	43.3 ± 12.1
Fail	34.1 ± 2.8	62.2 ± 4.4	34.9 ± 3.5	62.0 ± 10.2	56.7 ± 12.1

NOTE: Numbers after ± give 95% confidence intervals. Portions of ranges lying below zero may be ignored.

Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d

§ 2000d. *Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin*

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VII of the Civil Rights Act of 1964, §§ 703(a), (h), 42 U.S.C. §§ 2000e-2(a), (h)

§ 2000e-2. *Unlawful employment practices*

(a) *Employer practices*

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII § 703(a), (h)

(h) *Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions*

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

42 U.S.C. § 1981

§ 1981. *Equal rights under the law*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 30 1981
ALEXANDER L. STEVAS
CLERK

No. 81-431

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,

Petitioners,

-v.-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-0957/4338

LEONARD KOERNER,
JUDITH A. LEVITT,
of Counsel.

QUESTIONS PRESENTED

1. Is a finding of intentional discrimination prerequisite to liability under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d?

2. Is a finding of intentional discrimination prerequisite to liability under 42 U.S.C. §1981?

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IN THE
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-v.-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Respondents submit this brief in opposition to a petition for a writ of certiorari

filed August 31, 1981. The petition seeks review of a judgment by the United States Court of Appeals for the Second Circuit dated July 25, 1980 which affirmed in part and reversed in part an order of the United States District Court for the Southern District of New York and remanded for entry of a new decree. Specifically, petitioners seek review of the judgment insofar as it denied petitioners relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and 42 U.S.C. §1981.

STATEMENT OF THE CASE

Respondents herein are the petitioners in Civil Service Commission of the City of New York, et al. v. The Guardians Association of the New York City Police Department, Inc., et al., No. 81-432, filed on August 31, 1981, which also seeks review of the judgment of

the Court of Appeals dated July 25, 1980.* The Court is respectfully referred to the petition therein for a more complete statement of the case. To avoid unnecessary repetition, this statement will be limited to the facts relevant to petitioners' claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and 42 U.S.C. §1981.

Between 1968 and 1970, the New York City Department of Personnel administered eight civil service examinations for the position of New York City Police Officer. Each examination resulted in an eligible list for appointment on which candidates were rank-ordered in accordance with their test scores, adjusted by veterans' prefer-

*In No. 81-432, petitioners (respondents herein) seek review of the judgment to the extent that it granted relief to the plaintiff class under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq.

ence. Each of the eligible lists was established prior to the amendment of Title VII in 1972 which extended the coverage of the statute to municipal employees.

A hiring freeze was imposed on the New York City Police Department from May, 1970 to January, 1973. While some appointments were made from these eligible lists prior to the freeze, the bulk of the appointments were made between January, 1973 and October, 1974, during which time the lists were exhausted. In October, 1974, a hiring freeze was again imposed on the Police Department. On June 30, 1975, the Police Department was required to lay off approximately 2,800 police officers for budgetary reasons. The layoffs were made in accordance with Section 80 of the New York Civil Service Law in the inverse order of appointment.

(2)

In May, 1975, the named plaintiffs herein filed charges of discrimination with the Equal Employment Opportunity Commission challenging the proposed layoffs as discriminatory against black and Hispanic police officers. On May 2, 1976, plaintiffs commenced this action on behalf of all black and Hispanic police officers laid off on June 30, 1975. Plaintiffs alleged that, but for the discriminatory examinations in 1968-70, they would have been appointed earlier and would have accrued sufficient seniority to withstand the layoffs. Plaintiffs argued that the layoffs were discriminatory in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq., as well as 42 U.S.C. §§1981 and 1983.

After an evidentiary hearing, the District Court concluded that the examinations and their use after 1972 were discriminatory under Title VII and therefore the layoffs were discriminatory under Title VII. The Court further found that neither the examinations nor the layoffs were intentionally discriminatory and dismissed plaintiffs' claims under 42 U.S.C. §§1981 and 1983. The Court directed defendants to reorder the seniority lists to accord plaintiffs' constructive seniority.

Defendants appealed from the preliminary injunction order. On June 21, 1977, the Court of Appeals vacated the injunction and remanded to the District Court for reconsideration in light of this Court's decision in International Brotherhood of Teamsters v. United States,

431 U.S. 324 (1977). Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission of the City of New York, 562 F. 2d 38 (2d Cir., 1977).

On remand, plaintiffs amended their complaint to assert a claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and redirected the focus of their complaint from the layoffs to the initial hiring, in view of Teamsters, supra.

On February 27, 1979, the District Court again granted plaintiffs' application for a preliminary injunction. Having earlier found that the eligible lists were based upon examinations which did not satisfy Title VII standards, the Court held that the use of the lists as of 1972 constituted a "discriminatory refusal to

hire" in violation of Title VII. In accordance with Teamsters, supra, only those black and Hispanic officers hired after 1972 had a claim under Title VII and relief could extend back only to 1972, the effective date of the Act.

The Court then held, however, that the Title VII "impact" standard was applicable to claims of employment discrimination under Title VI, rather than the constitutional "intent" standard. Therefore, since plaintiffs stated a claim of discriminatory refusal to hire under Title VII, they stated an identical claim under Title VI. And since Title VI became effective in 1964, all plaintiffs appointed from the 1968-70 examinations were eligible for relief. The Court adhered to its earlier decision dismissing plaintiffs' claims under 42 U.S.C. §§1981 and 1983.

Defendants again appealed from the preliminary injunction order to the Court of Appeals. By decision dated July 30, 1980, the Court of Appeals affirmed the District Court's holding on plaintiffs' claims under Title VII and 42 U.S.C. §§1981 and 1983, and reversed that portion of the District Court's opinión and order which held plaintiffs entitled to relief under Title VI.

Judge Meskill, writing for the Court of Appeals, held that there is no implied private right of action for compensatory relief under Title VI. Judge Kelleher concurred with Judge Coffrin in rejecting the Title VI claim on the ground that the appropriate standard for determining liability under Title VI is the constitutional "intent" standard, not the Title VII "impact" standard.

Petitions for rehearing, with suggestions for rehearing en banc, were filed by all parties. On June 1, 1981, the Court of Appeals denied both petitions.

REASONS FOR DENYING THE WRIT

The Court of Appeals carefully and thoroughly considered petitioners' arguments that the impact standard is applicable in determining claims of employment discrimination under Title VI and 42 U.S.C. §1981 and rejected both contentions. The decision of the Court of Appeals is manifestly correct and further review is unwarranted.

1. A majority of this Court, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), resolved the question of the standard applicable to claims of discrimination under Title VI.

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a majority of this Court took the position that Title VI imposes the constitutional "intent" standard for a finding of liability. Justice Powell concluded that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." Id. at 287. Justice Brennan, speaking for himself and Justices White, Marshall and Blackmun agreed, stating: "In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment of employed by a State or its agencies." Id. at 328. And in Board of Education v. Harris, 444 U.S. 130, 160 (1979), Justices Stewart, Powell and Rehnquist, in their dissent, expressed the view that the Court had determined in Bakke that the proof of intentional discri-

mination was necessarily to a claim under Title VI.

Nevertheless, petitioners continue to argue that the pre-Bakke decision in Lau v. Nichols, 414 U.S. 563 (1974), requires the implication of the "impact" with the decision of the Court of Appeals herein. In support of their contention, petitioners argue: (1) the language in Bakke regarding the "intent" standard is merely dicta and is not applicable since Bakke did not present any question of a facially neutral action which has a disparate impact; (2) Title VI should be interpreted consistently with Title VII; and (3) the imposition of the "intent" standard conflicts with agency regulations purporting to provide for enforcement of Title VI.

This Court has extensively reviewed the legislative history of Title VI in

both Bakke and in Board of Education v. Harris, supra. Petitioners have expressed no disagreement with the analyses therein, and have failed to bring to this Court's attention any point the Court may have overlooked. They simply assert that the conclusions expressed in Bakke might be different in the context of a facially neutral action which has a disparate impact. Absent any legislative history to suggest that Congress intended a dichotomy in the interpretation of Title VI, petitioners fail to present any substantial question to this Court for review.

Similarly, petitioners do little more than assert that Title VI and Title VII must be interpreted consistently. Their primary argument is that it would be an "anomaly" for federally-funded employers to be held to a less stringent standard

under Title VI than non-federally-funded employers would be held to under Title VII. However, since Title VII applies to both public and private employers, funded and non-funded, the "anomaly" is false. It would be a greater anomaly for Title VI to impose different standards in different claims absent specific statutory authorization for such different standards, than for two separate statutes to impose different standards on discrete sets of employers.

Finally, although administrative interpretation of legislation may be entitled to deference, that interpretation must fall if it is in conflict with the statutory authorization. If, as we believe, Title VI requires proof of intentional discrimination, agency regulations imposing a more stringent standard upon employers does not constitute simply an enforcement device

as petitioners contend. Rather, the regulations go beyond their enabling legislation and provide for liability where Congress did not. The regulations cited by petitioners are clearly in conflict with the constitutional intent standard and therefore, in conflict with Title VI.

Petitioners have failed to set forth any reasons for reconsideration by this Court of the opinions expressed in Bakke and Board of Education v. Harris, supra, that the constitutional "intent" standard applies to all claims of discrimination under Title VI, including claims of employment discrimination.*

*It should also be noted that petitioners fail to even address the issues raised by Judge Meskill concerning whether there is an implied private right of action under Title VI, and, if so, whether there are limitations on the relief available, and the claimants necessary to state a claim under Title VI. Absent a definitive decision on these questions, the applicable standard need not be considered here.

2. The petition fails to provide any substantive basis for believing that the Congress which enacted 42 U.S.C. §1981 in 1866 intended to embody an "impact" standard.

Petitioners rely solely on the fact that this Court granted certiorari in Davis v. County of Los Angeles, 566 F. 2d 1334 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979), to support their claim that certiorari is warranted here to review the decision of the Court of Appeals insofar as it held that a claim under 42 U.S.C. §1981 requires proof of intentional discrimination. Although the question of whether §1981 embodies an impact standard or requires a showing of intent is one on which this Court has not expressly spoken, we believe that the Court has quite clearly, if only implicitly, indicated that the statute requires proof of intentional discrimination. Furthermore, petitioners

do not, and cannot, provide any basis for inferring that the Congress which enacted the original version of the statute in 1866 intended any other result.

In Washington v. Davis, 426 U.S. 229 (1976), this Court held that intent was necessary to a finding of unconstitutional discrimination under 42 U.S.C. §1983, specifically noting that plaintiffs also relied on §1981. Id. at 233. Indeed, §1981 was quoted in its entirety by the Court in footnote 2. Id. at 233. See, also, id. at 248, 255 (Stevens, J., concurring), and 257 (Brennan, J., dissenting).

Moreover, quite apart from what may be the precedential effect of Washington v. Davis on this issue, the legislative history of §1981 precludes petitioners' argument that it was intended to render unlawful facially neutral governmental actions which are not

racially motivated.

Although §1981, like §1982, reaches private as well as public discrimination (see Runyon v. McCrary, 427 U.S. 160 (1976)), essentially what both statutes were intended to secure to blacks were equal rights (with whites) to, inter alia, make and enforce contracts, sue, and enjoy the equal protection of the law (§1981) and to "inherit, purchase, lease, sell, hold and convey real and personal property" (§1982). These were in 1866, and still are, most important, fundamental rights. At least as against governments and those acting under color of law these rights have been "constitutionalized" in the Fourteenth Amendment, itself the product of Congress' debates in 1866 and subsequently ratified in 1868.

These statutes, however, are not exhaustive of all those possible rights which a concerned Congress, informed by a century of post-Civil war history, might wish to secure to our citizens and other residents. They obviously were not intended to accomplish all that was accomplished by the Civil Rights Act of 1964. And, given the era and the historical matrix in which these statutes were adopted, we believe it is entirely unlikely, indeed impossible, that Congress intended to impose a more onerous basis for liability under these statutes than that embodied in the Fourteenth Amendment; that is, to make unlawful public or private acts which were devoid of any racial motivation and were facially neutral. In the context of §1982 this Court has indicated that §1 of the 1866 Act was "meant to prohibit ... racially motivated deprivations

of the rights enumerated in the statute...." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426 (1968) (dicta). And under both §1981 and §1982, it would seem that the constitutional intent standard should obtain. See Resident Advisory Bd. v. Rizzo, 564 F. 2d 126, 140-143 (3rd Cir., 1977), cert. denied, 435 U.S. 908 (1978); Arnold v. Ballard, 448 F. Supp. 1025 (N.D. Ohio, 1978). These statutes are in pari materia with, and correlative with, the Fourteenth Amendment. They should be construed in harmony with it. Arnold v. Ballard, supra, at 1028.

Sections 1981 and 1982 are fundamentally guarantees of equal protection, like the Fourteenth Amendment, but against private as well as public discrimination. In terms of the equal protection, and equal right to contract, guaranteed to minorities by §1981, we believe this Court's Washington v. Davis

analysis is here entirely apt. There the Court stated (426 U.S. at 246):

> "Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21."

As the Court also there noted (id. at 248):

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." [Footnote omitted.].

In addition, since §1981 reaches private action, plaintiffs' expansive reading of this statute would have even further consequences than those discussed by the Court. Conceivably, under petitioners' reading of the statute, it would impact on private sellers of good and services, as well as employers, providing only that the challenged practice, whether it be pricing policy or marketing strategy, or other business practice, produced a disparate impact, and requiring in such cases that the private actor show a business justification for his conduct. Indeed, taking petitioner's argument to its logical extreme, we can envision the use of §1981 to challenge student recruitment policies of private colleges and universities, the pricing policies of hospitals and doctors and other professionals, and

in short reaching into all areas of private contractual relationships where economic or other disabilities correlated with race undoubtedly disproportionately affect different segments of our population.

Because the logic of petitioners' argument seems necessarily to carry this far, their argument must be rejected. However radical the Radical Republicans of 1866 may have been, they certainly were not this radical.

* * *

The petition herein baldly asserts that review of the decision of the Court of Appeals is warranted to resolve important issues. However, petitioners then fail to present any basis for believing that the Court of Appeals was in error in its analysis of the standards imposed by Title VI and 42 U.S.C. §1981. Indeed, petitioners

ignore legislative history and gloss over recent decisions of this Court concerning their claims. Neither issue presented herein by petitioners merits further consideration by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, A WRIT OF CERTIORARI, SHOULD BE DENIED.

November 30, 1981.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel for
the City of New York,
Attorney for Respondents.

LEONARD KOERNER,
JUDITH A. LEVITT,
of Counsel.

Petitioner's Brief

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No. 81-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,
Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

CHRISTOPHER CROWLEY
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

Of Counsel:

JUNE ROSE
JOAN GUGGENHEIMER
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

KENNETH KIMERLING
CESAR A. PERALES
Puerto Rican Legal Defense
and Education Fund, Inc.
95 Madison Avenue
New York, New York 10016
Tel.: (212) 532-8470

Questions Presented

In a civil rights action in which plaintiffs prove that non-job-related entry-level employment examinations have a discriminatory impact on minority applicants,

1. Is proof of discriminatory intent necessary to establish a prima facie case under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and its implementing regulations?

2. Is proof of discriminatory intent necessary to establish a prima facie case under 42 U.S.C. § 1981?

Parties in the Court of Appeals

The parties to the proceedings in the Court of Appeals for the Second Circuit were petitioners (hereinafter "plaintiffs") the Guardians Association of the New York City Police Department, Inc., the Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez and Felix E. Santos individually and on behalf of all others similarly situated, and respondents (hereinafter "defendants") Civil Service Commission of the City of New York, Department of Personnel of the City of New York, the New York City Police Department, Alphonse D'Ambrose, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, James Smith and Josephine Gambino, individually and in their capacity as members of the Civil Service Commission of the City of New York, and Michael J. Codd, individually and in his capacity as Commissioner of the New York Police Department.

The Equal Employment Opportunity Commission filed a brief as amicus curiae in the Second Circuit, joining the plaintiffs in urging reversal of the § 1981 issue. The Department of Justice filed a brief as amicus curiae joining the plaintiffs in urging a rehearing of the ruling in the Court of Appeals on the Title VI issue.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-431

THE GUARDIANS ASSOCIATION, *et. al.*,

Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the Court of Appeals for the Second Circuit are reported at 633 F.2d 232 and reprinted in the Joint Appendix (A1-94).* A prior order of the Court of Appeals is also included in the Joint Appendix (A137-38). Two opinions of the District Court are reported at 466

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* On February 22, 1982 this Court granted the parties' joint motion to dispense with the printing of a joint appendix. References to (A ——) are to pages in the Joint Appendix to the Petition for Writ of Certiorari, filed on August 31, 1981.

F. Supp. 1273 and 431 F. Supp. 526. The district court opinions and order are set forth in the Joint Appendix (A99-136, 139-97).

Jurisdiction

The Court of Appeals for the Second Circuit entered judgment on July 25, 1980 (A95-96). Plaintiffs' timely petition for rehearing and suggestion for rehearing en banc was denied on June 1, 1981 (A97-98). The petition for this writ of certiorari was filed on August 31, 1981, and was granted on January 11, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)(1976).

Statutory Provisions

The statutes involved are Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1976), and 42 U.S.C. § 1981 (1976). The text of § 601 of Title VI and of § 1981 is set forth in the Joint Appendix (A198-99).

Statement of the Case

This case involves a challenge by black and Hispanic police officers to several written examinations administered by New York City between 1968 and 1970 and used to make entry-level appointments to the Police Department (the "Department") through October 1974. The courts below found that the challenged examinations had a discriminatory impact on the scores and pass-rates of blacks and Hispanics and were not job-related. These findings are not at issue on this writ of certiorari.

Each police officer seeking relief from discrimination in this case achieved a passing score on one of the challenged

examinations and "has been certified by the department to be both fully qualified to enter the police training program and fully qualified to join the force" (A29).

Since entry-level appointments to the Department were made in order of test score, however, the examinations determined not only eligibility for appointment, but also the candidates' order of appointment, and thus their seniority and related benefits. In 1975 when the Department laid off police officers on a "last-hired, first-fired" basis, those officers who had achieved the lowest scores on the examinations were laid off first. Because blacks and Hispanics had passed with lower scores than whites, minority officers were disproportionately affected by the layoffs.

The courts below held that the use of these examinations violated Title VII of the Civil Rights Act of 1964. Officers hired after March 24, 1972, the date Title VII became applicable to municipalities,* were entitled to retroactive seniority and other relief, not to include any period of time prior to March 24, 1972. Those officers hired before the effective date of the statute could obtain no relief. While the district court had held that Title VI provided an independent basis for relief for the period not encompassed by Title VII, the Court of Appeals held that both Title VI and § 1981 require proof of intent, an element which plaintiffs had not established. Thus, some members of the plaintiff class will obtain no relief at all, and others will obtain only partial relief.

The procedural history of this case is set out below.

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* Although Title VII was enacted in 1964, municipalities were not defined as "employers" subject to Title VII until the Act was amended effective March 24, 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1).

The 1972 Action ("Guardians I")

In 1972, the Guardians Association, the Hispanic Society, and several minority police officers and applicants* commenced a suit alleging that examinations administered during the years 1968 to 1970 had a disproportionate impact on the appointment and promotion of minorities in the Department, were improperly prepared, were not job-related, and therefore violated, *inter alia,* 42 U.S.C. §§ 1981 and 1983. *Guardians Association* v. *Civil Service Commission,* 490 F.2d 400, 402 (2d Cir. 1973); (A3). In March 1973, the plaintiffs moved for a preliminary injunction against appointments from the ranked eligibility lists generated by these examinations. 490 F.2d at 403. The district court denied the motion based on the Department's representation that the eligibility lists soon would be fully exhausted, and the Court of Appeals affirmed. 490 F.2d at 403-04.

The Present Action ("Guardians II")

In June 1975, the Department laid off approximately 2,800 police officers on a "last-hired, first-fired" basis. A substantially disproportionate number of the furloughed police officers, 21.5%, were minorities. *Guardians Association* v. *Civil Service Commission,* 431 F. Supp. 526, 531 (S.D.N.Y. 1977) (*"Guardians II"*) (A142).

On April 30, 1976, plaintiffs commenced the present class action. As amended, the complaint alleged that the June layoffs violated the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, Titles VI and VII of the Civil Rights

* The individual plaintiffs in *Guardians I* included minority police officers who had unsuccessfully sought promotions within the Department as well as minority applicants who had been denied appointments.

Act of 1964, 42 U.S.C. §§ 2000d *et seq.* and 2000e *et seq.*, and various other state and federal laws (A4). Plaintiffs contended that the challenged examinations caused those minorities who passed the examinations to do so with lower scores than whites. Since the defendants appointed police officers to the Department in rank order based on their examination scores and laid off the most recent hires first, but for the discriminatory impact of the examinations on minorities, plaintiffs would have been hired earlier and thus would have had sufficient seniority to withstand the layoffs (A4).

The district court dismissed plaintiffs' claims under §§ 1981 and 1983, concluding without discussion that because proof of discriminatory intent is required to establish a constitutional claim in accordance with *Washington* v. *Davis*, 426 U.S. 229 (1976), proof of discriminatory intent is also a necessary element of a claim under either § 1981 or § 1983. Despite testimony by the Deputy Commissioner amounting to an "unqualified condemnation of the defendants['] motivations," the district court concluded that the evidence showed only "complacency of officials in the police department and the Department of Personnel with respect to the status quo," (A152-53), and not the requisite discriminatory intent.

The district court concluded, however, that plaintiffs' proof that the challenged examinations had a disproportionate impact on the scores received by black and Hispanic applicants established a prima facie case of discrimination in hiring under Title VII (A5). The court further concluded that defendants had failed to rebut plaintiffs' prima facie case by demonstrating that the examinations were job-related (A5). Finally, the district court held that the 1975 layoff of police officers perpetuated the effects of the De-

partment's pre-1972 discriminatory practices and thus brought within the scope of Title VII employment decisions based on examinations that predated the effective date of the Act (A5-6).

The district court granted a preliminary injunction restraining the Department from firing or recalling officers until the seniority lists were adjusted to accord plaintiffs the seniority they would have had but for defendants' discriminatory practices (A140). Since the district court afforded relief to all class members under Title VII, it did not reach the issue of plaintiffs' entitlement to relief under Title VI.

On June 21, 1977, the Second Circuit vacated the preliminary injunction and remanded for reconsideration in light of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), in which this Court ruled that a bona fide seniority system that merely perpetuates the effects of pre-Title VII discrimination is protected by § 703(h) of that statute, 42 U.S.C. § 2000e-2(h) (A137-38).

On Remand ("Guardians III")

On remand, the district court concluded that *Teamsters* did not defeat the Title VII claims of those class members hired after March 24, 1972, but did preclude Title VII relief for police officers hired before March 24, 1972.* Since some class members were hired prior to that date, the district court looked to Title VI, which became effective in

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* The court concluded that discrimination against policemen hired before March 24, 1972 ended before the Act became applicable to municipalities and that *Teamsters* precluded liability based on the Department's bona fide seniority system even if that system perpetuated the effects of prior discrimination (A114-15). As to class members hired after March 24, 1972, the district court noted that *Teamsters* would limit the scope of their relief by precluding retroactive seniority for any period prior to March 24, 1972 (A115).

1964, to determine whether that statute provided relief to the entire class.*

Relying on *Lau* v. *Nichols,* 414 U.S. 563 (1974), as well as on the language and purpose of Title VI and the regulations promulgated thereunder, the district court concluded that "[s]upport for the thesis that Title VI does not ban only intentional discrimination is overwhelming" (A132). The district court granted relief to class members hired prior to March, 1972 on the ground that relief under Title VI can be predicated on a showing of discriminatory impact comparable to the showing required under Title VII (A135-36).

Guardians III On Appeal

On appeal, the Second Circuit unanimously affirmed the district court's decision with respect to Title VII liability (A45). The panel also affirmed the district court's rejection of the § 1981 claim on the ground that § 1981 requires a showing of discriminatory intent (A77).

Regarding the Title VI issue, the majority of the panel concluded that a plaintiff must prove discriminatory intent, not merely discriminatory impact, in order to establish entitlement to relief under Title VI.** The majority recognized that *Lau* v. *Nichols,* 414 U.S. 563 (1974), "may be read for the contrary proposition" (A93) and that application of an intent standard to Title VI suits

> "leads to the unhappy anomaly that there would be a more stringent standard for proving illegal

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* As a preliminary matter, the district court concluded that defendants had received federal funds with a "primary objective" of employment (A123). *See* 42 U.S.C. § 2000d-3.

** The third member of the panel concluded that there is no private right of action for compensatory relief under Title VI, although defendants had not advanced this argument on appeal.

> discrimination by employers utilizing federal funds than there would be for nonfederally-funded employers under Title VII" (A93).

Nevertheless, the majority concluded that language expressed or endorsed by a majority of this Court in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), indicated that Title VI incorporates a constitutional standard of discrimination and thus compelled the conclusion that claims brought under Title VI are subject to the intent standard established in *Washington* v. *Davis*, 426 U.S. 229 (1976), for Fourteenth Amendment claims. Since no purposeful discrimination had been shown, the majority held that the challenged conduct was not a violation of Title VI.

The Court of Appeals vacated the order of the district court and remanded the case for further proceedings in conformity with its opinion (A95-96). Both parties filed petitions for rehearing with suggestions for rehearing en banc. The Department of Justice filed a brief as amicus curiae urging rehearing of the Title VI issue. The Second Circuit denied both petitions on June 1, 1981.

Summary of Argument

I

In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court recognized the broad remedial purpose of Title VI and unanimously held that the statute and implementing agency regulations bar conduct that has the effect, even if not the intent, of discriminating on the basis of race, color, or national origin in the distribution of federally funded benefits. The case now before this Court is governed by *Lau*.

The holding of *Lau* v. *Nichols* is firmly rooted in the language and the legislative history of the statute. Title VI, on its face, does not require proof that the challenged discriminatory practices are purposeful or unconstitutional. A broad reading of the plain language of Title VI is consistent with the legislative history, which shows that Congress was concerned with eliminating racially disparate distribution of federally funded benefits and demonstrates that Congress specifically chose not to incorporate constitutional standards or require proof of intent to discriminate.

Moreover, numerous agencies have issued regulations pursuant to the mandate of § 602 of Title VI. These regulations, which prohibit practices that are discriminatory in *effect,* are persuasive evidence of legislative intent, are enforceable as "reasonably related" to the underlying legislation, and represent contractual conditions with which defendants agreed to comply in exchange for the receipt of federal funds.

The Second Circuit's conclusion that proof of discriminatory impact is insufficient to establish a prima facie case of discrimination in employment under Title VI ignores the language of the statute, the legislative history, and the agency regulations, and is erroneously based exclusively on *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), a case that did not involve facially neutral practices with discriminatory effects.

II

The decision below with respect to § 1981 similarly undermines the effectiveness of a statute designed as a far-reaching effort to root out discrimination. The language of § 1981 is affirmative and unqualified. Moreover, the broad language reflects the purpose of the enacting Congress. Section 1981 was aimed at eradicating the vestiges of

slavery and, in particular, at eradicating the Black Codes, which prevented the freedmen from assuming normal economic roles in their communities, not only by means of patently discriminatory provisions, but also by means of facially neutral provisions that were discriminatory in effect.

Construing § 1981 to require proof of purposeful discrimination would frustrate the goals sought to be accomplished by Congress. An impact test, by contrast, is consistent with the purpose of the statute and, particularly in the area of employment, will at the same time provide an objective, clear, and predictable test that is consistent with other statutory tests for discrimination.

ARGUMENT

POINT I

Proof of Intent to Discriminate Is Not Required to Establish a Prima Facie Case Under Title VI.

This case is squarely governed by *Lau* v. *Nichols*, 414 U.S. 563 (1974), in which this Court held that proof of the discriminatory impact of a facially neutral practice is sufficient to establish a prima facie case of discrimination against the recipient of federal funds under Title VI and its implementing regulations. The "impact" or "effects" standard is consistent with the language of the Act, is supported by the legislative history, and is expressly set forth in the regulations of the federal agencies charged with the enforcement of the statute.*

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* In *Board of Education* v. *Harris*, 444 U.S. 130, 143-44 (1979), this Court noted that "the impact approach itself embraces at least two separate standards: a rebuttable disparate-impact test and a stricter irrebuttable disproportionate-impact test." The district court below, applying the less stringent "rebuttable disparate-impact test" of Title VII as a model for the Title VI claim, found that plaintiffs had prevailed under Title VI (A135).

The Second Circuit's narrow construction of a statute designed to insure "simple justice" * in the expenditure of federal funds not only conflicts with this Court's holding in *Lau*, but also undermines Congress' broad exercise of its powers to insure against discriminatory use of federal funds and conflicts with the clear mandate of the agencies entrusted with interpreting and enforcing the statute.

A. In *Lau* v. *Nichols* This Court Applied an Impact Standard to Claims Brought Under Title VI

In *Lau* v. *Nichols*, non-English speaking Chinese students brought a class suit against officials responsible for the operation of a San Francisco school district alleging that the school district provided unequal educational opportunities in violation, *inter alia*, of Title VI and of the Equal Protection Clause of the Fourteenth Amendment. Both the district court and the court of appeals denied relief. In a unanimous decision, this Court reversed, declining to reach the constitutional issue but holding that plaintiffs had established entitlement to relief under Title VI by showing that the challenged conduct had discriminatory effects.

The Court recognized that "[t]he Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed", 414 U.S. at 569, and, relying on the relevant agency regulation, concluded:

> "Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting

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* *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. at 1454 (1963) (hereinafter *"House Subcomm. Hearings"*); 110 Cong. Rec. 6543 (1964).

> individuals to discrimination' or have 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.' " 414 U.S. at 568 (quoting 45 C.F.R. § 80.3(b)(2)).*

In addition, the Court emphasized the school district's contractual obligation to comply with the relevant agency regulations:

> "Respondent school district contractually agreed to 'comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation' of HEW (45 CFR pt. 80) which are 'issued pursuant to that title . . .' and also immediately to 'take any measures necessary to effectuate this agreement.' " *Id.* at 568-69.

Since "the Chinese-speaking minority receive[d] fewer benefits than the English-speaking majority" from the federally funded program, the case was remanded for the "fashioning of appropriate relief." *Id.*

The case now before this Court is governed squarely by *Lau* v. *Nichols.* Like the defendants in *Lau,* the defendants in this case received federal financial assistance and must comply with Title VI and all regulations promulgated thereunder by the funding agencies.** As in *Lau,* the

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* Three members of the Court concurred in the result based on the standard set forth in the agency regulations. These regulations were reasonably related to the statute and were "entitled to great weight" in interpreting Title VI. 414 U.S. at 571. The Court thus was unanimous in holding that Congress could, and did, enact a statute that can reach discriminatory effects, and that agency regulations proscribing such effects are enforceable by a private party.

** The defendants receive funds from the Departments of Labor, Housing and Urban Development, and Justice (A123).

applicable regulations specifically and uniformly prohibit the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination." 414 U.S. at 568.* Thus, defendants here, like the defendants in *Lau* v. *Nichols,* were required by statute, by regulation, and as an express contractual condition on the receipt of federal financial assistance to avoid the use of non-job-related examinations that had the effect of discriminating against the plaintiffs.

B. An Impact Standard Is Consistent With the Language of Title VI

The *Lau* "impact" standard is consistent with the plain language of Title VI. Section 601 of the Act provides, in absolute terms:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Thus, the language of the statute is, on its face, "majestic in its sweep." *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 284 (1978) (opinion of Powell, J.).

The unqualified language of § 601 is particularly significant in light of abundant evidence that when Congress intended to incorporate constitutional standards into a statutory provision, it knew how to do so by express statutory language. Indeed, Congress did incorporate an express constitutional standard into Title IV, which, like Title VI, was enacted as part of the Civil Rights Act of 1964. Title

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* 29 C.F.R. § 31.3(b)(2) (Labor); 28 C.F.R. § 42.104(b)(2) (Justice); 24 C.F.R. § 1.4(b)(2) (H.U.D.).

IV empowers the Attorney General to institute a civil suit upon receipt of a written complaint

> "signed by a parent or group of parents to the effect that his or their minor children . . . are being deprived by a school board of the *equal protection of the laws* . . . ." 42 U.S.C. § 2000c-6(a) (emphasis added).

Title IV also contains the following proviso:

> ". . . [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, *or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.*" 42 U.S.C. § 2000c-6(a) (emphasis added).*

See also Title III, 42 U.S.C. § 2000b(a) (authorizing suits by Attorney General upon complaint of individual claiming deprivation of "right to the equal protection of the laws").

In view of the express references to "equal protection of the laws" and "constitutional standards" contained in contemporaneous legislation, the absence of any such limiting

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* The inclusion of a constitutional standard in Title IV was a result of Congress' concern "that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18-19 (1971). In *Parent Ass'n of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 716 (2d Cir. 1979), the Second Circuit suggested that Title VI requires proof of intent in school desegregation cases by analogy to Title IV, but that disparate impact is sufficient in employment cases by analogy to Title VII.

language in Title VI* cannot be viewed as accidental. Logic and well settled principles of statutory construction dictate that "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed." *General Electric Co.* v. *Southern Construction Co., Inc.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). *See also Richerson* v. *Jones*, 551 F.2d 918, 928 (3rd Cir. 1977).

C. An Impact Standard Is Consistent With the Legislative History of Title VI

The legislative history leaves no doubt that Congress intended the "majestic" sweep of the statute's plain language to reach practices that, regardless of purpose, are unjustifiably discriminatory in effect. Moreover, although opponents expressed strong concern that Title VI would authorize the termination of federal funding in the absence of purposeful discrimination, the supporters refused to limit the substantive scope of the statute. Finally, in 1966 Congress expressly rejected a proposed amendment to Title VI that would have required proof of intent and would have overruled existing "effects" regulations promulgated by administrative agencies.

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* Most other provisions of the Act, like Title VI, lack any express constitutional references. These provisions have been interpreted as incorporating an "impact standard." *See, e.g., Olzman* v. *Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974) (public facilities, Title II, 42 U.S.C. § 2000a); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (employment, Title VII, 42 U.S.C. § 2000e). The prohibition against housing discrimination in Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, also imposes an impact standard. *Robinson* v. *12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-37 (2d Cir. 1979); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

1. *An Impact Standard Is Necessary to Effectuate the Broad Remedial Purpose of Title VI*

In enacting Title VI, Congress relied on its authority to condition grants of federal financial assistance with reasonable restrictions. *See* 110 Cong. Rec. 2467 (1964) (remarks of Rep. Celler). *See also Lau* v. *Nichols,* 414 U.S. at 569. The broad reach of the spending power was recently reaffirmed by this Court in *Fullilove* v. *Klutznick*:

> "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." 448 U.S. 448, 474 (1980).*

The broad remedial purpose of Title VI, as evidenced in its legislative history, leaves little doubt that Congress intended to exercise the full scope of this power in order not only to insure the elimination of purposeful discrimination but, more importantly, to insure availability to all persons, regardless of race, color, or national origin, of benefits financed with funds collected from all taxpayers. As stated by President Kennedy in his message to Congress proposing the legislation and reiterated by Senator Humphrey at the opening of the floor debates on the Civil Rights Act of 1964:

> "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *House Subcomm. Hearings* at 1454; 110 Cong. Rec. 6543 (1964).

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* *See also Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 280-81 (1969); *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, 145 (1947) (cited by Rep. Celler at 110 Cong. Rec. 2467); *Helvering* v. *Davis,* 301 U.S. 619 (1937); *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937).

The proponents of the Civil Rights bill asserted that Title VI was, and should be, the strongest and most far-reaching provision of the Act,* effectuating "a broad nondiscrimination principle" ** in order to remove any vestige of discrimination from federally funded activities*** and insure that taxpayers, who provide funds for federal programs, are able to share equally in the programs' benefits. Senator Kuchel, for example, stated in his presentation of the Civil Rights bill to the Senate,

> "The taxes which support those programs are paid into treasury by all citizens regardless of their race. It is simple justice that all citizens should derive *equal benefits* from these programs without regard to the color of their skin." † 110 Cong. Rec. 6561 (emphasis added).

The Republican membership of the House Committee on the Judiciary expressed a similar sentiment:

> "Title VI, in effect, provides that the taxes paid to the Federal Government by all Americans shall be used to assist all Americans on an equal basis." *Id.* at 6566.

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* "This is a strong bill and this is the strongest provision in the bill. . . ." 110 Cong. Rec. 2469 (remarks of Rep. Libonati).

** 110 Cong. Rec. 7058 (remarks of Sen. Pastore). *See also id.* at 6544 ("a broad principle that is right and necessary") (remarks of Sen. Humphrey), *id.* at 7064 (remarks of Sen. Ribicoff).

*** 110 Cong. Rec. 6561 (remarks of Sen. Kuchel).

† In addition, Senator Kuchel quoted President Eisenhower's statement that "If there is any benefit to be derived from [federal funds], I think they must all share, regardless of such inconsequential factors as race and religion." 110 Cong. Rec. 6561.

See also 110 Cong. Rec. 1519 (remarks of Rep. Celler) (Title VI "would assure Negroes the benefits now accorded only to white students in programs . . . financed by Federal funds"); *id.* at 6543 (remarks of Sen. Humphrey); *id.* at 8346 (remarks of Sen. Prox-

(footnote continued on following page)

This focus on the need to distribute in an even-handed manner funds that are collected even-handedly necessarily involved consideration of nonpurposeful discrimination; only by requiring that the benefits of federally funded programs were not distributed in a way that has the *effect* of discriminating could Congress insure that those benefits, funded by all taxpayers regardless of race, were made available to all taxpayers regardless of race.

The examples of discrimination which were introduced during the congressional hearings and debates further evidence Congress' intention to reach discriminatory effects. In describing discrimination in the federally funded school lunch program, for example, Senator Pastore stated:

> "I am not talking now about the fact that the program is administered in segregated schools. That is a different issue. I am talking about situations such as that in Greenwood Separate School District of Mississippi, where during the years 1960-62 Negro children, who make up half the average daily attendance in Greenwood schools, received only one fifth of the free lunches served . . ." *Id.* at 7055.

Senator Pastore's concern obviously was not with motive, but with disparity in result. Senator Pastore similarly expressed concern about *de facto* segregation in U.S. Employment Service offices:

> "In addition to offices segregated by law, there are many offices segregated in fact by being located

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(footnote continued from preceding page)

mire) ("Taxes are collected from whites and Negroes, and they should be expended without discrimination"); *House Subcomm. Hearings* at 2653 (Statement of Attorney General Robert F. Kennedy that the Civil Rights Act "must establish the principle that there shall be no such discrimination among the beneficiaries of federally financed programs or activities to which all taxpayers contribute").

> in all-Negro or white neighborhoods, or because the office specialized in processing jobs customarily barred to Negroes." *Id.* at 7058 (quoting from 1961 Report, U.S. Commission on Civil Rights, Employment, pp. 121-122).

The significance of this evidence of the broad policy objectives of the statute is consistent with references in the congressional hearings and debates to "equal protection" and "constitutional principles." * These references to constitutional principles, made at a time when discrimination was practiced in more blatant forms, do not mean that Congress understood the Fourteenth Amendment to prohibit only intentional or explicit racism. Except in school desegregation cases, in which the concepts of de facto and de jure segregation were emerging, Congress and the courts had few occasions to focus on distinctions between discriminatory impact and purposeful discrimination. Indeed, prior to *Washington* v. *Davis* it was not clear "whether the principal element of a constitutional claim of racial discrimination was discriminatory purpose or simply discriminatory effect." Perry, *The Disproportionate Impact Theory*

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* The opinions of Justices Powell and Brennan in *Bakke* highlighted some of these references. However, the legislative analysis in *Bakke* was in the context of the standard of justification for intentional racial classification rather than, as here, the standard for establishing a prima facie case of discrimination.

Many of the references to the Constitution, particularly in the Senate, were an effort to bolster the constitutional basis of Title VI. *See e.g.*, 110 Cong. Rec. 5253 (remarks of Sen. Humphrey) (discrimination in use of federal funds "clearly violative of the Constitution"); *id.* at 13333 (remarks of Sen. Ribicoff) ("basically, there is a constitutional restriction against discrimination in the use of federal funds"); *id.* (remarks of Sen. Morse) (use of federal funds in discriminatory programs "unconstitutional"); *id.* at 13334 (remarks of Sen. Pastore) (same). The above remarks were made in response to attacks on the constitutionality of Title VI. *See, e.g., id.* at 13383 (remarks of Sen. McClellan); *id.* at 5233 (remarks of Sen. Long).

of Racial Discrimination, 125 U. Pa. L. Rev. 540, 544 (1977) (footnote omitted).* As this Court itself recognized, prior to *Washington* various courts of appeals held that unjustified disproportionate racial impact was sufficient to prove a violation of the Equal Protection Clause. 426 U.S. at 244 and n.12.

In addition, several decisions of this Court prior to 1964 emphasized the impropriety of examining the motivations of a legislature, thereby raising some doubt as to the necessity or possibility of proving discriminatory intent that did not appear on the face of the legislative or administrative act. *See, e.g., Sonzinsky* v. *United States,* 300 U.S. 506 (1937); *United States* v. *Darby,* 312 U.S. 100 (1941); *McCray* v. *United States,* 195 U.S. 27 (1904). *Cf. Palmer* v. *Thompson,* 403 U.S. 217 (1971); *United States* v. *O'Brien,* 391 U.S. 367 (1968). Thus, in 1964 Congress would not have assumed that references to equal protection principles were limited to protection from purposeful discrimination. Nor does the clarification in *Washington* v. *Davis* as to the proper standard for equal protection cases have any bearing on the understanding of Congress in 1964. *See Moor* v. *County of Alameda,* 411 U.S. 693, 700 (1973).

More importantly, the goal of Congress was broader than simply ending federal financial support of unconstitutional discrimination. Significantly, the supporters of the bill did not speak only of "equal protection," but also used

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* *See also City of Mobile* v. *Bolden,* 446 U.S. 55, 68 at n.13 (1980) (Stewart, J. for plurality) (discussing *Forston* v. *Dorsey,* 379 U.S. 433 (1965)); *id.* at 108-09 (Marshall, J. dissenting); Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination,* 25 Vand. L. Rev. 1183, 1184 (1972) ("A governmental act that either draws racial lines explicitly or has the effect of classifying persons by race establishes a prima facie case of racial discrimination") (footnote omitted).

such terms as "simple justice," * "the moral sense of the nation," ** and "equal opportunity." *** Equal protection principles are consistent with a broader goal of nondiscrimination—a goal that encompasses the elimination of discriminatory effects regardless of their source. An impact standard reflects Congress' desire to insure that federal funds, collected from all taxpayers regardless of race, color, or national origin, are distributed in a manner that is not only constitutional, but is fair and just.

2. *The Proponents of Title VI Refused to Limit the Scope of the Statutory Proscription Against "Discrimination"*

The objections and concerns voiced in Congress with respect to the breadth of Title VI, and the legislative response to these concerns, provides even more persuasive evidence that Congress intended Title VI to apply to nonpurposeful discrimination.

During the House Subcommittee hearings on Title VI, several Congressmen expressed concern that Title VI empowered federal agencies to terminate federal funding based upon a finding of "racial imbalance", even in the absence of purposeful discrimination. These opponents closely questioned Secretary Celebrezze of the Department of Health, Education and Welfare, the federal official who would have primary responsibility for enforcing Title VI in school cases. Despite considerable pressure, Secretary

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* 110 Cong. Rec. 6543 (remarks of Sen. Humphrey); *id.* at 6561 (remarks of Sen. Kuchel).

** 110 Cong. Rec. 6544 (remarks of Sen. Humphrey). *See Bakke*, 438 U.S. at n.21.

*** *House Subcomm. Hearings* at 932 (message from President John F. Kennedy dated February 28, 1963).

Celebrezze refused to preclude the possibility that termination of federal funding could be triggered by racial imbalance. *House Subcomm. Hearings* at 1514-20. When Representative Meader inferred from the Secretary's testimony that HEW would be authorized to redraw school district lines in order to rectify racial imbalance, Chairman Celler suggested that it might be appropriate to incorporate "criteria" or "standards" in the statute to guide the administative agencies and serve as "a governing force" and "restraint." *Id.* at 1520-21. He requested Secretary Celebrezze to submit "some sort of [draft] guidelines under which [HEW] would have to operate with reference to Title VI." *Id.* at 1522. Similarly, Representative Cramer asked the Secretary to submit a "definition . . . of racial imbalance for consideration of the committee," noting that "[t]he Committee might want to consider defining racial imbalance in the legislation." *Id.* at 1523. Yet the bill passed by the House contained no "guidelines" or limitations on the broad scope of the term "discrimination."

Similarly, in the Senate floor debates opponents objected to the unlimited scope of § 601, and called for a definition of the term "discrimination." *See, e.g.*, 110 Cong. Rec. 5860-64 (Sen. Eastland and Sen. Ervin); *id.* at 5612 (Sen. Talmadge). In the Senate, as in the House, these efforts were unavailing.

Thus, the suggestions that Congress define "racial imbalance" or "discrimination" were rejected and no specific guidelines were enacted. Instead, the concern over the breadth of the term "discrimination" and the issue of "racial imbalance" resulted in a compromise—the addition of § 602 —which required federal agencies to enact regulations setting forth their enforcement criteria and provided procedural

safeguards, in the form of hearings and judicial review, for recipients found to be in non-compliance.*

The hearings and debates with respect to the scope of the term "discrimination" demonstrate that Congress knew not only that the broad language of Title VI could be applied expansively by the administrative agencies, but, more specifically, that Title VI could be interpreted to reach discriminatory effects even without proof of intent. The potential implication of Congress' refusal to limit the meaning of "discrimination," after learning of the probable administrative construction of the term, was described by the bill's opponents as follows:

> ". . . [T]he administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance . . . ." Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, *reprinted in* 1964 U.S. Code Cong. & Ad. News at 2436.

Under these circumstances, it can be inferred from Congress' "deliberate failure" to alter the substantive scope of the statute** or adopt suggestions by opponents of the bill to include a more precise definition of "discrimination" that Congress approved a broad interpretation of Title VI encompassing nonpurposeful discrimination. *See National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453, 460-61 (1974).

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* In recognition of the "latitude" given to administrative agencies to draft regulations, the bill was amended in the Senate to add the further requirement that the President approve the regulations. 110 Cong. Rec. 2499 (1964).

** As discussed at pages 13-14 above, Congress did include a limitation in Title IV restricting the Attorney General's enforcement power in school desegregation cases to instances of constitutional discrimination. 42 U.S.C. § 2000c-6(a); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 18-19.

3. *Congress Reaffirmed That Title VI Is Not Limited to Purposeful or Unconstitutional Discrimination By Refusing to Amend the Statute in 1966*

Two years after the passage of the Act and after numerous federal agencies established "impact" standards by regulation, a proposed amendment that would have altered Title VI to prohibit only intentional discrimination was defeated on the floor of the House and never emerged from committee in the Senate. 112 Cong. Rec. 10061, 18715 (1966).* The proposed amendment was introduced by two vehement critics of the 1964 legislation—Senator Ervin in the Senate and Representative Whitener in the House. Both Congressmen strongly criticized the "effects" regulations promulgated by the administrative agencies and asserted that the proposed amendment would prohibit reliance on the impact standard under Title VI. Referring to a proposed subsection which would require a finding of "affirmative intent" to discriminate, they stated:

> "The purpose of this subsection is to negate the application of purely mechanistic and statistical criteria in the determination of discrimination." 112 Cong. Rec. 10061 (remarks of Sen. Ervin); *id.* at 18701 (remarks of Rep. Whitener).

While the proponents of the 1966 amendment contended that it would not change the intent of Congress in enacting

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* As amended, the statute would have conditioned fund terminations on a "violation of a provision of the Constitution, or an affirmative provision of a statute of the United States which has been established by substantial evidence." 112 Cong. Rec. 10062, 18701 (1966). The proposed amendment further provided that a determination under Title VI that "discrimination" exists in the administration of any program or activity could be predicated only upon substantial evidence that a condition or requirement was imposed "with affirmative intent to exclude, or with the necessary effect of excluding individuals from participation in the benefits of such program or activity solely upon the ground of race, color, or national origin." *Id.*

Title VI, the response to the proposal by Representatives Rodino and Kastenmeier, who were both members of the 1964 House Subcommittee, leaves little doubt that the proposed amendment in fact was directly contrary to the intent of Title VI as enacted in 1964.

Representative Rodino, for example, stated that the proposed amendment "presents new criteria and restricts the workings of title VI of the 1964 Civil Rights Act," and that the amendment "would in effect be a complete repealer of the title VI of the 1964 act." 112 Cong. Rec. 18703. Representative Rodino further expressed his "understanding" that the rules promulgated by federal agencies pursuant to § 602 of the Act "are consistent with the objectives of the title." *Id.*

Representative Kastenmeier, like his opponents, was well aware of administrative efforts to enforce Title VI.* He unequivocally rejected the amendment, which he believed would destroy Title VI of the 1964 Act. *Id.* at 18705. According to Representative Kastenmeier, the sponsors of the proposed amendment

> "have now sought to undo what we have done in the past. This intent would not only adversely affect the present legislation, it would gut title VI of the 1964 law." *Id.*

The refusal of Congress in 1966 to amend Title VI has dual significance. First, the rejection of the amendment and the remarks of Representatives Rodino and Kastenmeier indicate that in 1966 Congress interpreted Title VI to impose an impact standard. The interpretation of a

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* Representative Kastenmeier was a member of a 1965 special ad hoc subcommittee formed for the purpose of examining, *inter alia*, the administration and application of the 1964 Act. The special subcommittee conferred extensively "with all the people concerned with the administration" of Title VI. 112 Cong. Rec. 18705.

subsequent Congress is persuasive evidence of legislative intent.* Second, since the 1966 Congress was aware of "impact" regulations issued by the administrative agencies, those regulations are entitled to particular weight. As this Court has held, the "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, *especially when Congress has refused to alter the administrative construction.*" *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (footnotes omitted) (emphasis added). *See also United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

D. The Agency Regulations Enacted Pursuant to Title VI Uniformly Impose An Impact Standard

Section 602 of Title VI provides, in pertinent part:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability

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* *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969); *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-44 (1972). Since 1964, Congress has enacted ten additional statutes containing clauses modeled on § 601. In none of these statutes is "discrimination" defined to require proof of intent. *See* 20 U.S.C. § 1681(a) (Title IX of the Educational Amendments of 1972); 29 U.S.C. § 794 (Rehabilitation Act of 1973); 31 U.S.C. § 1242 (Revenue Sharing Act) (1976); 42 U.S.C. § 3766(c)(1) (Crime Control Act of 1973); 42 U.S.C. § 5309 (Housing & Community Development Act of 1976); 42 U.S.C. § 5672(b) (Juvenile Justice Act of 1974); 42 U.S.C. § 6102 (Age Discrimination Act) (1975); 42 U.S.C. § 6709 (Public Works Employment Act) (1976); 42 U.S.C. § 6870(a) (Energy Conservation & Resource Renewal Act of 1976); 45 U.S.C. § 803 (Railroad Revitalization and Regulatory Reform Act) (1976).

> which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President." 42 U.S.C. § 2000d-1.

On December 4, 1964, just five months after final passage of the Civil Rights Act, seven federal agencies, including the Department of Labor, issued regulations approved by the President pursuant to § 602 (29 Fed. Reg. 16274-16305). All seven agencies included in their regulations a provision identical to the broad disparate impact regulation upheld in *Lau* v. *Nichols*. On July 5, 1973, every federal agency published amendments to its Title VI regulations, again implementing impact standards.

The defendants in this case received funds "primarily for employment" from three federal agencies: the Department of Labor (DOL), the Department of Housing and Urban Development (HUD), and the Department of Justice (DOJ). The regulations of these agencies, *see* note at page 12 above, which proscribe practices that are discriminatory in effect, are entitled to substantial weight as evidence of Congressional intent and are enforceable as measures reasonably required for the effectuation of Congressional intent and as contractual conditions of the federal grants.

1. *The Agency Regulations Are Persuasive Evidence of Legislative Intent*

As stated in *Udall* v. *Tallman*:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." 380 U.S. 1, 16 (1965).

See also Griggs v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971). The administrative interpretation should be followed "unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 381, particularly where, as here, the administrative interpretation

> "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall* v. *Tallman*, 380 U.S. at 16 (quoting *Power Reactor Co.* v. *International Union of Electricians*, 367 U.S. 396, 408 (1961)).

See also Griggs v. *Duke Power Co.*, 401 U.S. at 433-34.

Moreover, as discussed in the preceding section, Congress recognized and approved Title VI "impact" regulations only two years after Title VI was enacted. A "contemporaneous interpretation . . . followed by all agencies . . . together with acquiescence of the Congress, must be given great weight." *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956). Congress again specifically endorsed these Title VI regulations when it enacted the Public Works Employment Act of 1976, which provides for enforcement "through agency provisions and rules similar to those already established, with respect to racial and other discrimination under title VI of the Civil Rights Act of 1964." 42 U.S.C. § 6709. Deference to administrative regulations is particularly appropriate where, as here, "an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford*, 442 U.S. at 554.

In *Lau* v. *Nichols*, this Court relied on Title VI regulations comparable to those at issue here. 414 U.S. at 568,

571. *See also Bakke,* 438 U.S. at 304; *id.* at 342-43. Such reliance is consistent with the intended role of the agencies in implementing Title VI, since it is beyond dispute that Congress expressly entrusted administrative agencies with the task of spelling out guidelines to be followed by recipients of federal funds. *See, e.g.,* 110 Cong. Rec. 2468, 2499, 7058; *House Subcomm. Hearings* at 2740.

Thus, a departure from the consistent interpretation of administrative agencies would conflict not only with settled rules of statutory construction, but also with the expression of "the will of Congress." *Griggs* v. *Duke Power Co.,* 401 U.S. at 434.

2. *The Agency Regulations Are Reasonably Related to Title VI and Are Therefore Enforceable*

Even if this Court concludes that Title VI does not itself impose an impact standard, the agency regulations must nevertheless be upheld as "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 369 (1973) (quoting *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 280-81 (1969)).

The DOL, DOJ and HUD regulations, as well as other regulations promulgated by agencies administering federal funds, were enacted pursuant to the express Congressional mandate of § 602 of the statute. In enacting § 602, Congress not only *authorized* each agency extending federal financial assistance to effectuate the provisions of Title VI with regulations "consistent with achievement of the objectives of the statute," but *directed* each agency to do so. In view of this explicit delegation, the agencies' regulations, if reasonably related to the statute, are not only entitled to deference as evidence of legislative intent, but in addition,

have the force of law. *See Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977).

The reasonable relationship between the regulations and the statute is readily apparent. Indeed, the concurring opinion in *Lau* explicitly stated that guidelines and regulations similar to the regulations at issue here were "reasonably related" to the purpose of Title VI, 414 U.S. at 571, and the entire Court in *Lau* relied on agency regulations. In *Fullilove* v. *Klutznick*, 448 U.S. at 479, this Court reaffirmed the appropriateness of the Title VI regulation upheld in *Lau*—a regulation that is almost identical to the regulations involved in this case.

Moreover, the conclusion reached in *Lau* is consistent with the legislative history of Title VI. As discussed above at pages 15-21, the purpose of Title VI was to insure that funds collected from all taxpayers would be used to benefit all taxpayers without regard to race, color or national origin. A regulation that proscribes use of "criteria or methods of administration which . . . have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin" is not merely "reasonably related" to the purpose of the enabling statute: it is precisely tailored to the purpose of that statute.

Finally, the conclusion in *Lau* is consistent with administrative reality. In effectuating Title VI, "the transactions or conduct which Congress seeks to administer occur in myriad and changing forms . . . ." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. at 374. The task of inquiring into the intent of the many administrators of programs receiving federal funds would be overwhelming for the federal agency and disruptive for the recipient of funds. Even if Title VI itself is aimed only at purposeful discrimi-

nation, promulgation of a broader standard is reasonable if an intent standard "would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely." *Mourning*, 411 U.S. at 374. The difficulty of proving "intentional discrimination," *see* pages 36-37 below, and the dictates of administrative necessity and convenience amply support use of an impact standard.*

3. *Defendants Agreed to Abide by the Regulations Upon the Receipt of Federal Funds*

In *Lau* v. *Nichols*, this Court held that the respondent "contractually agreed" to comply with Title VI and all requirements imposed by regulations issued thereunder. 414 U.S. at 568. In *Fullilove* v. *Klutznick*, this Court reaffirmed the power of the government to impose such contractual conditions. 448 U.S. at 474.

The legislative history of Title VI demonstrates that agency rulemaking was mandated in part to insure that applicants for federal funding would be informed as to the rules that will be followed in the administration of the program and "the recipients . . . will understand what they can or cannot do." *House Subcomm. Hearings* at 2740 (remarks of Att. Gen. Kennedy). Defendants here, as in *Lau*, promised to comply with Title VI and its implementing regulations as a condition to the receipt of federal funds. Indeed, the regulations themselves require that every application for federal financial assistance "shall, as a condition to its approval and the extension of any such Federal finan-

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* Use of an impact standard has consistently been recognized as reasonably related to the goal of eliminating intentional discrimination. *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

cial assistance . . . contain or be accompanied by an assurance that the program or activity will be conducted . . . operated and administered in compliance with all requirements" set forth in the regulations. 24 C.F.R. § 1.5 (HUD); 28 C.F.R. § 42.105(DOJ); 29 C.F.R. § 31.6(DOL). The findings below leave no doubt that defendants have failed to abide by this "assurance."

E. The Application of Title VI and Implementing Regulations to Programs That Are Discriminatory in Effect Does Not Conflict With the Post-*Lau* Decisions of This Court

Despite the overwhelming evidence that Congress intended Title VI to reach programs that have the effect of discriminating, and despite agency regulations that specifically set forth an impact standard, the majority of the panel below concluded that a result contrary to *Lau* v. *Nichols* was required by *Regents of the University of California* v. *Bakke*. Petitioners submit that *Bakke*, and other cases decided by this Court after *Lau*, are entirely consistent with the district court's award of relief under Title VI in this case.

Bakke concerned the legality under Title VI of a program that assured the admission to medical school of a specified number of students from certain minority groups by using a concededly intentional racial classification. 438 U.S. at 269-70.

> "[I]t was clear in *Bakke* that whatever the reach of Title VI, the plaintiff had established a prima facie case by showing intentional discrimination. The question facing the Court, then, was whether some forms of intentional discrimination were nevertheless permissible." *NAACP* v. *The Medical Center, Inc.*, 657 F.2d 1322, 1330 (3rd Cir. 1981).

As the United States observed in its Supplemental Amicus Brief in *Bakke*:

> "This case does not present the question whether Title VI and the Constitution treat differently state programs that have a racially disproportionate impact. The special admissions program deliberately used racial criteria, and any differences between intentional discrimination and disproportionate effect do not require consideration here." Supplemental Brief for the United States as *Amicus Curiae* at p. 10.

A majority of the *Bakke* Court concluded that Title VI permits any explicit use of race that is consistent with the Constitution.* Justice Powell's opinion stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287. After concluding that Title VI enacted "constitutional principles," *id.* at 285, and that there

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* The opinion of Justices Stevens, Stewart and Rehnquist and Chief Justice Burger interpreted Title VI as a *per se* ban on all racial preferences, whether "benign" or stigmatizing, regardless of what the Constitution would permit. 438 U.S. at 414. The opinion stated that "[t]he statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendments would require," and that "Congress' expression of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not." *Id.* at 416-17 (opinion of Stevens, J.) (footnote omitted). This construction of Title VI, of course, is entirely consistent with *Lau*. Indeed the opinion commented on *Lau* v. *Nichols* as follows:

> "In *Lau* v. *Nichols*, 414 U.S. 563, the Government's brief stressed that 'the applicability of Title VI . . . does not depend upon the outcome of the equal protection analysis. . . . [T]he statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief.' Brief for United States as *Amicus Curiae*, O.T. 1973, No. 72-6520, p. 15. The Court, in turn, rested its decision on Title VI." 438 U.S. at 417 n.20.

was no basis for assuming that these principles offered less "equal protection" to whites than to non-whites, the opinion eschewed a "restrictive view of the Equal Protection Clause" and refused to "hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign'." *Id.* at 294 (footnote omitted). It was recognized that this equal protection issue was not implicated in *Lau,* which was distinguished as follows:

> "The decision [in *Lau*] rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices 'which have the effect of subjecting individuals to discrimination.' " *Id.* at 304.

Lau v. *Nichols* was also distinguished on the ground that the "preference" approved in *Lau* did not cause denial of the relevant benefit to anyone else. These distinguishing factors are equally applicable in this case. Here, as in *Lau,* the statute has been construed by the responsible administrative agencies to reach discriminatory effects and the relief sought will not deny the relevant benefits to non-minority individuals.

The opinion of Justices Brennan, White, Marshall and Blackmun similarly concluded that the standard to be applied to purposeful racial classifications is the same under Title VI as under the Fourteenth Amendment. This opinion concluded, however, that a racial classification, whether challenged under the Constitution or under Title VI, is not subject to strict scrutiny where that classification is "part of a remedy for societal discrimination . . . ." *Id.* at 348. Citing *Lau,* the opinion relied substantially on relevant agency regulations, which "are entitled to considerable deference in construing Title VI." *Id.* at 342 and 351-53.

The emphasis in *Bakke* on the primary importance of agency regulations and the broad discretion granted to ad-

ministrative agencies to effectuate the policies of Title VI is consistent with *Lau* and is virtually ignored by the decision of the Second Circuit. Significantly, in *Fullilove* v. *Klutznick*, decided after *Bakke*, a plurality of this Court cited with approval *Lau's* validation of the HEW "effects" regulation. 448 U.S. at 479.* Moreover, imposing an "intent" standard on plaintiffs in this case is surely contrary to the spirit, if not the letter, of an opinion that emphasized Congress' concern with assuring minorities "the full benefits of activities receiving federal financial support." *Bakke*, 438 U.S. at 335.

In short, while a majority of this Court in *Bakke* concluded that intentional racial classifications that are permissible under the Constitution are also permissible under Title VI,

> "It does not inexorably follow . . . that Congress . . . intended the constitutional standard to control every allegation of discrimination. It would be consistent with Congress's expansive, remedial intent to interpret Title VI as prohibiting acts that have the effect of discrimination yet permitting patent preferences designed to remedy past discrimination." *NAACP* v. *The Medical Center, Inc.*, 657 F.2d at 1330.

* * *

Title VI "declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance . . . ." H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2400. If Title VI is to retain any vitality as a means of combating racial discrimination and, more particularly, as a means of insuring that federal

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* A majority of this Court refused to consider the issue in *Board of Education* v. *Harris*, 444 U.S. 130 (1979).

funds do not underwrite the perpetuation of discrimination, it must address itself realistically to the forms of discrimination now prevalent in our society. If federal agencies, directed by Congress to enforce the policies of Title VI, are to guard effectively against government complicity in discriminatory practices, these agencies must be free to enforce the statute by means of reasonable standards.

An intent test will frustrate this remedial goal of Title VI. As the Seventh Circuit stated in *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights* with respect to Title VIII:

> "[A] requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy. '[I]ntent, motive and purpose are elusive subjective concepts,' *Hawkins* v. *Town of Shaw*, 461 F.2d 1171, 1172 (5th Cir. 1972) (*en banc*) (*per curiam*), and attempts to discern the intent of an entity such as a municipality are at best problematic . . . (citations omitted). A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly." 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

The Seventh Circuit's words are no less true with respect to Title VI. Indeed, imposition of an intent requirement in cases such as this would not only "permit municipalities to

systematically deprive minorities of [employment] opportunities simply because those municipalities act discreetly," but would permit municipalities to do so *with federal funds.* Surely Congress can have intended no such result.*

By contrast, an impact standard, as intended by Congress and set forth in agency regulations, provides clear cut, objective guidelines "up front"; the guidelines are relatively simple for the recipient to follow and for the responsible federal agency to apply with a minimum intrusion into the activities of program administrators. As the Third Circuit recently stated,

> "Providing federal funding conditioned on an even-handed application is a positive measure to discourage all forms of discrimination, intentional or not. The use of an effects test, therefore, is consistent with the legislative aim of eliminating discrimination and is in harmony with Title VII of the same Act. . . ." *NAACP* v. *The Medical Center, Inc.,* 657 F.2d at 1331.

POINT II

Proof of Intent to Discriminate Is Not Required to Establish a Prima Facie Case Under § 1981.

Section 1981 derives from the Civil Rights Act of 1866, the first civil rights statute enacted after the end of the Civil War.** From that era until relatively recently, this Court had virtually no occasion to determine whether

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* The anomaly is clearly presented in this case. Under the Second Circuit's rulings, defendants would be entitled to use federal funds to support discriminatory practices that violate Title VII.

** Act of April 9, 1866, c. 31, § 1, 14 Stat. 27.

§ 1981, or indeed any of the other civil rights statutes enacted since 1866, proscribes actions or practices having discriminatory effect, without proof of discriminatory purpose; the prevalence of avowed and virulent intentional discrimination made such an inquiry unnecessary.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), however, this Court concluded that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, proscribes "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. The Court premised its conclusion on evidence that Congress intended the statute to insure "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* Following the *Griggs* decision, the lower federal courts, including the Second Circuit, consistently applied the *Griggs* standard to claims brought under § 1981.* This construction reflected a perception of the basic similarity in the goals the two statutes were designed to achieve.

In 1976, this Court decided, in *Washington* v. *Davis*, 426 U.S. 229 (1976), that claims of discriminatory state action arising directly under the equal protection provisions of the Constitution require proof of discriminatory purpose. *Washington* v. *Davis* did not disturb the holding of *Griggs*, nor did it apply an intent standard to the statutory claims at issue, § 1981 and § 1-320 of the D.C. Code. On the contrary, the statutory claims in *Washington* were tested by a standard "similar" to the Title VII test.

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* *See, e.g., Castro* v. *Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176-77 (2d Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

In its decision below, however, the Second Circuit reversed its pre-*Washington* v. *Davis* rule and held that proof of intent to discriminate is required to establish a prima facie case under § 1981. Plaintiffs submit that this holding, which is in no respect required by *Washington* v. *Davis* or by any other decision of this Court, is inconsistent with the language and legislative history of § 1981 and frustrates the ameliorative purposes for which the statute was enacted.

A. An Impact Standard Is Consistent With the Language of the Statute

Section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." The statute, which speaks in unqualified affirmative terms, does not refer to the motivation behind the infringement on or denial of civil rights, but provides unconditional statutory protection against the *condition* of having lesser contractual rights and opportunities than those "enjoyed by white citizens."

The broad language of § 1981 cannot be dismissed as a "mere slip of the legislative pen." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968). On the contrary, the reference in § 1981 to the rights actually "enjoyed" by white citizens and the absence of any language requiring or referring to intentional discrimination reflect Congress' concern with equality in the practical consequences of rights, not merely with the formal expression of equality. As Senator Trumbull stated when he introduced the bill, "[t]here is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." Cong. Globe, 39th Cong., 1st Sess. (1866) (hereinafter "Cong. Globe") at 474.

B. An Impact Standard Is Consistent With the Legislative History of § 1981

On its face, § 1981 prohibits *all* discrimination, whether or not purposeful; the legislative history demonstrates that "Congress meant exactly what it said." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 422. The specific concerns of the enacting legislature and the broader historical context of the statute both require that § 1981 be given "a sweep as broad as its language." *Id.* at 437.

The Civil Rights Act of 1866 was enacted at the very inception of the principle of racial equality in this country. The statute was introduced only weeks after ratification of the Thirteenth Amendment, and less than a decade after the Supreme Court had labeled Negroes "beings of an inferior order . . . altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect . . . ." *Dred Scott* v. *Sandford*, 19 How. 393, 407 (1857). *See generally, Bakke*, 438 U.S. at 387-94 (opinion of Marshall, J.) (description of history of racism in United States). Thus, it is not surprising that "[w]hen the Civil Rights Act of 1866 was introduced, both its supporters and its opponents alike recognized the revolutionary scope of its intended purpose of eliminating discrimination." *City of Memphis* v. *Greene*, 451 U.S. 100, 150 (1981) (Marshall, J., dissenting).

Faced with the problem of extreme and blatant racism, the 39th Congress had little cause to define or distinguish between various degrees and manifestations of discrimination. But the legislative history of § 1981 demonstrates that Congress did recognize that discrimination can assume a variety of forms, and that Congress accordingly exercised the full scope of its powers to enact legislation that would uproot all barriers, in whatever form, to the achievement of full practical equality for the newly-freed slaves.

The bill that became § 1981 was enacted pursuant to Congress' authority to enforce the Thirteenth Amendment. *Runyon* v. *McCrary*, 427 U.S. 160, 168-70 n. 8 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-38 (1968).* When the statute was enacted, the slaves had already been formally freed. However, Congress recognized that

> "[w]hile in the abstract slavery as a legal status was abolished, in the concrete, Adam Smith's free labor principles still were not applicable to Blacks in the South." *Croker* v *Boeing Co.*, 662 F.2d 975, 1003 (3rd Cir. 1981) (Gibbons, J., dissenting).

Thus the goal of the proposed statute was to "secure for all persons within the United States practical freedom," Cong. Globe at 474 (remarks of Sen. Trumbull), and to give the newly-ratified Thirteenth Amendment "practical effect and force . . . to prevent that great measure from remaining a dead letter upon the constitutional page of our country . . . to carry to its legitimate and just result the great humane revolution to which I have referred." *Id.* at 1151 (remarks of Rep. Thayer).

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* The Thirteenth Amendment abolished slavery, established "universal civil and political freedom throughout the United States" and granted power to Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery. . ." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Thus, "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 440. Whether or not § 1 of the Thirteenth Amendment itself reaches nonpurposeful discrimination, Congress may, pursuant to the enforcement power granted in § 2, adopt an effects test in legislation. *See City of Rome* v. *United States*, 446 U.S. 156 (1980); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

The statute was reenacted in 1870, two years after the adoption of the Fourteenth Amendment, as part of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 144. The reenactment did not, however, alter its Thirteenth Amendment foundation. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 436; *Runyon* v. *McCrary*, 427 U.S. at 168-70 n.8.

One undisputed purpose of Congress in enacting the Civil Rights Act of 1866 was the elimination of "the infamous Black Codes" enacted by the Southern states at the close of the Civil War. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 433. Congress deemed particularly objectionable those provisions of the Black Codes, often facially-neutral, that had the effect of preventing the freedmen from entering into normal economic relations with their former masters and communities—the vagrancy laws and the laws regulating the terms and conditions of employment.*

The vagrancy laws generally defined as a vagrant any adult who lacked employment, and provided that such persons should be arrested and either imprisoned or bound out as a laborer for a period of up to one year.** The labor laws generally made it a crime for an employee to leave his employment before the end of his contract term, and provided that if he did not complete his term his wages would be forfeited and he could be pursued and recovered. In most states, it was also a crime to induce an employee away from his employer during the term of his contract.*** Many of these vagrancy and labor laws were facially neutral,

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* *See, e.g.*, Cong. Globe at 603 (remarks of Sen. Wilson); *id.* at 588-89 (remarks of Rep. Donnelly); *id.* at 1151 (remarks of Rep. Thayer).

** *See, e.g.*, E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 33 (1875) (Georgia, Act of March 12, 1866); *id.* at 39 (Florida, Act of January 12, 1866); *id.* at 41-42 (Virginia); *id.* at 43-44 (Louisiana); 1 W. Fleming, *Documentary History of Reconstruction* 283-86 (1906) (Mississippi, Act of November 24, 1865); *id.* at 309-10 (South Carolina, Act of December 21, 1865).

*** *See, e.g.*, McPherson, *supra*, at 33-34 (Alabama, Act of February 16, 1866); *id.* at 43 (Louisiana, Act of December 21, 1865). Fleming, *supra*, at 275-77 (Florida, Act of January 12, 1866); *id.* at 288-89 (Mississippi, Act of November 25, 1865); *id.* at 298-308 (South Carolina, Act of December 21, 1865).

but resulted in the effective preclusion of the freedmen from the free labor market.* There is little question but that Congress intended that § 1981 would outlaw such facially neutral but effectively discriminatory provisions.

This construction of the 1866 Act is confirmed by the responses to the Codes by military officials in charge of the Union forces then occupying the South. By order of General Grant, all military commanders in the South were directed to issue and enforce orders protecting, *inter alia,* "colored persons from prosecutions in any of said States charged with offences for which white persons are not prosecuted or punished in the same manner or degree." General Orders, No. 3, January 12, 1866. McPherson, *supra,* at 122-23. In at least two states—Virginia and South Carolina—the military commanders almost immediately prohibited the enforcement of both facially discriminatory and facially neutral statutes. Congress was aware of, and expressed approval of, these orders, and its approval is forceful evidence of its intent to eliminate any practices that had the effect of discriminating.

In Virginia, for example, General Terry invalidated the vagrancy law, as applied to blacks, on the grounds solely of its evident and anticipated effects. The law defined as a "vagrant," *inter alia,* any person who lacked employment and refused to work "for the usual and common wages given to other laborers in the like work in the place where they are." McPherson, *supra,* at 42. Noting that employers in many counties had offered the freedmen "usual and common wages" that were "utterly inadequate to the support of themselves and families," Terry concluded:

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* The vagrancy laws were neutral on their face, with the exception of Mississippi's, and, in part, South Carolina's. The labor laws of Alabama and Louisiana were also facially-neutral; those of Florida, Mississippi, and South Carolina applied only to blacks. McPherson, *supra;* Fleming, *supra.*

> *"The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers.* It places them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. *The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated—a condition which will be slavery in all but its name."* Order of January 24, 1866, McPherson, *supra,* at 42 (emphasis supplied).

General Terry therefore ordered that the statute could not be enforced against the freedmen. *Id.*

In South Carolina, General Sickles ordered that the only vagrancy statutes that could be enforced were those applicable to "free white persons," and that even those laws, made neutral by his order, "shall not be considered applicable to persons who are without employment, if they shall prove that they have been unable to obtain employment, after diligent efforts to do so." Order of January 17, 1866, ¶ XIII. McPherson, *supra,* at 37. General Sickles also prohibited any

> "combinations or agreements which are intended to hinder, *or may so operate as to hinder, in any way,* the employment of labor—or to limit compensation for labor—or to compel labor to be involuntarily performed in certain places or for certain persons . . . ." *Id.* ¶ IV. McPherson, *supra,* at 36-37 (emphasis supplied).

Orders invalidating state laws were also issued by General Swayne in Alabama and General Thomas in Mississippi. *See* Cong. Globe at 603 (remarks of Sen. Wilson).

The military authorities had thus found it necessary, in order to combat racial discrimination, to take a wide variety of actions: to prohibit enforcement of state laws discriminatory on their face such as the South Carolina statute, or facially neutral state laws, such as the Virginia statute, and to prohibit private actions, whether intentionally discriminatory or simply having that effect in operation, as provided in General Sickles' order.

Congress approved of all these measures. Senator Wilson described the facially-neutral Virginia vagrancy law as having been "used to make slaves of men whom we have made free" and thanked General Terry for his order. He also praised General Sickles' order. Cong. Globe at 603. *See also id.* at 1759-1760 (remarks of Sen. Trumbull).

In sum, both the language and the legislative history of § 1981 demonstrate Congessional concern with breaking down the old order of forced labor, subservience, and dependency and establishing for the blacks full freedom and effective participation in the normal labor market. Congress recognized that the evils it sought to address included facially-neutral laws with a discriminatory impact as well as measures that discriminated on their face.

The breadth of the goal underlying § 1981 is even more apparent when the statute is viewed in the context of other legislation considered and enacted by the same Congress:

> "The 1866 Civil Rights Act was not an isolated technical enactment on a narrow specific subject, but a statute intended by those in control of the levers of political power in Congress to effect a major revolution in the Southern social order." *Croker* v. *Boeing Co.*, 662 F.2d 975, 1004 (3rd

Cir. 1981) (Gibbons, J., dissenting) (footnote omitted).

Congress' consideration of the Freedmen's Bureau bill simultaneously with the Civil Rights Act is particularly strong evidence of this desire to effect a "major revolution." The Freedmen's Bureau was established in March 1865 to provide food, clothing, fuel and land to "destitute and suffering refugees and freedmen." Act of March 3, 1865, c. 90, 13 Stat. 507, 508. Although the Bureau provided aid for refugees, including whites, it was generally regarded by supporters and opponents alike as designed to make special provisions for the freedmen. *See generally, Bakke,* 438 U.S. at 391, 397 (opinion of Marshall, J.). Inasmuch as the Bureau was to continue in operation only until one year after the end of the war, Sen. Trumbull introduced in January 1866, as a companion bill to the Civil Rights bill, a measure (S. 60) to extend the life of the Bureau and to expand its scope. Cong. Globe at 129.*

Opponents of the measure objected to it on the ground that special assistance to the freedmen was unnecessary; having been freed from slavery, the freedmen were on an equal footing with whites.** The bill's supporters, how-

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* In addition to providing additional direct assistance, the bill also included anti-discrimination provisions and proposed an extensive system of military jurisdiction for the protection of the freedmen. Unlike the original Freedmen's Bureau Act, the proposed legislation was to continue in force indefinitely.

The bill was passed in February 1866 but did not survive the President's veto. It is set forth as adopted by Congress in McPherson, *supra,* at 72-74. A modified bill was enacted over the President's veto a few months later. Act of July 16, 1866, c. 200, 14 Stat. 173.

** "Then here are four million people made free . . . as free as any Senator upon this floor, as free to contract, as free in every respect, I may say, as any of us, so far as their former relations are concerned. If they have been made free and brought into the class of citizens, upon what principle do we authorize the officers of the government to buy homes for them?" Cong. Globe at 317 (remarks of Sen. Hendricks). *See also id.* at 623 (remarks of Rep. Kerr).

ever, flatly rejected such a limited view. They stressed the actual educational and economic circumstances of the freedmen, as opposed to their technically "free" legal status.*

In the Freedmen's Bureau bill, Congress thus rejected a narrowly-focused, technical view of freedom; it recognized that the former slaves, having just emerged from complete dependency, could not realistically be expected to obtain immediate employment, education or property, and that radical measures were necessary and preferred in order to achieve the goal of practical freedom.

> "The willingness of the majority in Congress to go as far as proposed in the Freedmen's Bureau bill speaks thunderously about the impetus behind the companion Civil Rights Act." *Croker* v. *Boeing Co.*, 662 F.2d at 1006 (Gibbons, J., dissenting).

Congress' broad, realistic approach to the meaning of freedom cannot be viewed in isolation. The Congress that approved the Freedmen's Bureau bill undoubtedly adopted a comparably "revolutionary" stance with respect to the discrimination facing the freedmen, and did not intend to restrict its remedial legislation to proven cases of purposeful discrimination.

C. An Impact Standard Is Necessary to Effectuate the Purpose of § 1981

In the 116 years since the enactment of the 1866 Civil Rights Act, the forms of discrimination have indeed

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* *See, e.g.*, Cong. Globe at 588 (remarks of Rep. Donnelly) ("We have liberated four million slaves in the South. It is proposed by some that we stop right here and do nothing more. Such a course would be a cruel mockery. These men are without education, and morally and intellectually degraded by centuries of bondage."); *id.* at 365 (remarks of Sen. Fessenden); *id.* at 322 (remarks of Sen. Trumbull).

changed, but the fact of discrimination has not. The consequences of slavery were immediate in 1866, prompting the enactment of not only the Civil Rights Act, but the Freedmen's Bureau Act as well. The effects of slavery are more attenuated today, but they still exist.

> "When the context is race, however, the problem of the stigma of caste cannot be confined to purposeful stigmatizing action. It is a global problem, this inheritance from slavery and the system of racial subordination that took slavery's place . . . . Racism, 1970's-style, is a living system, just as Jim Crow was a system. The main difference between the two systems is that today's racism inflicts a greater proposition of its harms unthinkingly. One who is stumbled over often enough may, understandably, notice that those cumulative impacts bear a certain functional resemblance to kicks." Karst, *The Supreme Court, 1975 Term—Forward: Equal Citizenship Under the Fourteenth Amendment,* 91 Harv. L. Rev. 1, 50-51 (1977) (footnotes omitted).

A construction of § 1981 that requires plaintiffs to adduce proof of purposeful discrimination in order to make a prima facie case would not comport with—would indeed frustrate—the goals sought to be accomplished by the 39th Congress.

A disparate impact standard is consistent with the "revolutionary" goals of the 39th Congress, while posing no insurmountable hurdles for the defendant. The statutory standards governing Title VII actions, for example, require only that an employer demonstrate that the practice or criterion in question is "job-related," *i.e.*, that it bear "a demonstrable relationship to successful performance of the jobs for which it was used." *Griggs* v. *Duke Power Co.*, 401 U.S. at 431. This standard has been met in many cases in

this Court and the lower federal courts.* The disparate impact standard has also been adopted in actions arising under other titles of the Civil Rights Acts of 1964 and 1968. Although the number of such cases is relatively small, it is apparent that defendants have been able to meet comparable "business necessity" standards.**

Thus, the concern expressed by this Court in *Washington* v. *Davis* that adoption of an effects test "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes," 426 U.S. at 248, need not govern in this statutory context. Unlike the strict scrutiny standard of the Fourteenth Amendment, which imposes an almost impossible burden on defendants, a disparate impact standard establishes a presumption which a defendant may more easily rebut.

As the Second Circuit has noted:

> "We must not forget the limited office of the finding that black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume." *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 393 (2d Cir. 1973).

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* *See, e.g., New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 and n.31 (1979); *Contreras* v. *City of Los Angeles*, 656 F.2d 1267, 1284-85 (9th Cir. 1981); *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972); *Boyd* v. *Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977).

** *See, e.g., Bryan* v. *Koch*, 627 F.2d 612, 617-18 (2d Cir. 1980) (Title VI); *NAACP* v. *The Medical Center, Inc.*, 657 F.2d 1322 (3rd Cir. 1981) (Title VI); *Boyd* v. *Lefrak Organization*, 509 F.2d 1110 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975) (Title VIII).

In sum, the adoption of an effects standard for claims arising under § 1981 furthers the purpose of the statute by providing a needed and salutary opportunity for persons suffering the discriminatory effects of "artificial, arbitrary, and unnecessary barriers" to challenge those barriers and for the question of justification to be both raised and answered. In the area of employment in particular, and in other areas in which a statutory effects test governs, this construction of § 1981 promotes clarity and predictability in the law.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below with respect to Title VI and § 1981 and remand for the fashioning of appropriate relief.

Respectfully,

CHRISTOPHER CROWLEY
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

Of Counsel:

JUNE ROSE
JOAN GUGGENHEIMER
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

KENNETH KIMERLING
CESAR A. PERALES
Puerto Rican Legal Defense
and Education Fund, Inc.
95 Madison Avenue
New York, New York 10016
Tel.: (212) 532-8470

Respondent's Brief

No. 81-431

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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,
Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-4338/2091

LEONARD KOERNER,
JUDITH A. LEVITT,
GREGG M. MASHBERG,
SUSAN D. WAGNER,
of Counsel.

Adams Press Corp., 130 Cedar Street, N. Y. 10006—(212) 233-1050

Questions Presented*

In a civil rights action alleging unlawful discrimination in employment, if plaintiffs prove that non-job-related entry-level employment examinations had a discriminatory effect on minority applicants,

1. Must plaintiffs also prove discriminatory intent as a prerequisite to relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and its implementing regulations?

2. Must plaintiffs prove discriminatory intent as a prerequisite to relief under 42 U.S.C. §1981?

Parties in the Court of Appeals

The parties to the proceedings in the Court of Appeals for the Second Circuit were petitioners The Guardians Association of the New York City Police Department, Inc., the Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez and Felix E. Santos, individually and on behalf of all others similarly situated, and respondents Civil Service Commission of the City of New York, Department of Personnel of the City of New York, the New York City Police Department, Alphonse D'Ambrose, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, James Smith and Josephine Gambino, individually and in their capacity as members of the Civil Service Commission of the City of New York and Michael J. Codd, individually

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* The questions set forth herein are those contained in the petition for a writ of certiorari granted by this Court. Petitioners have altered the questions before the Court in their Brief.

and in his capacity as Commissioner of the New York City Police Department.

The Equal Employment Opportunity Commission filed a brief as *amicus curiae* in the Second Circuit, joining the petitioners on the section 1981 issue. The Department of Justice filed a brief as *amicus curiae* joining the petitioners in seeking a rehearing of the ruling in the Court of Appeals on the Title VI issue.*

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* Six groups have been granted leave to appear as *amici curiae* before this Court. The American Civil Liberties Union and the New York Civil Liberties Union have filed a joint brief (hereafter referred to as "Civil Liberties Unions' Br.") and the Asian American Legal Defense and Education Fund and the Mexican American Legal Defense and Education Fund have filed a joint brief (hereafter referred to as "Legal Funds' Br."). The National Association for the Advancement of Colored People has also filed a brief. Respondents have been advised that the Equal Employment Advisory Council intends to file a brief.

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No. 81-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,
Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

Opinions Below

The opinions of the Court of Appeals for the Second Circuit (including a concurring opinion) are reported at 633 F. 2d 232 and reprinted in the Joint Appendix (A1-

94).* A prior order of the Court of Appeals is also included in the Joint Appendix (A137-38). Two opinions of the District Court are reported at 466 F. Supp. 1273 and 431 F. Supp. 526. The District Court opinions and order are set forth in the Joint Appendix (A99-136, 139-97).

Jurisdiction

The Court of Appeals for the Second Circuit entered judgment on July 25, 1980 (A95-96). Petitioners' timely petition for rehearing and suggestion for rehearing en banc was denied on June 1, 1981 (A97-98). The petition for this writ of certiorari was filed on August 31, 1981, and was granted on January 11, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions

The statutes involved are Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, and 42 U.S.C. §1981. The texts of section 601 of Title VI and of section 1981 are set forth in the Joint Appendix (A198-99).

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* On February 22, 1982, this Court granted the parties' joint motion to dispense with the printing of a joint appendix. References to (A —) are to pages in the Joint Appendix to the Petition for Writ of Certiorari, filed on August 31, 1981.

Statement of the Case

(1)

Between 1968 and 1970, the New York City Department of Personnel* administered eight civil service examinations for the position of New York City Police Officer. Each examination resulted in an eligible list for appointment on which candidates were rank-ordered in accordance with their test scores, adjusted by veterans' preference. Each of the eligible lists was established prior to the amendment of Title VII in 1972 which extended the coverage of the statute to municipal employees.

A hiring freeze was imposed on the New York City Police Department from May, 1970 to January, 1973. While some appointments were made from these eligible lists prior to the freeze, the bulk of the appointments were made between January, 1973 and October, 1974, during which time the lists were exhausted. In October, 1974, a hiring freeze was again imposed on the Police Department. On June 30, 1975, the Police Department was required to lay off approximately 2,800 police officers for budgetary reasons. The layoffs were made in accordance with section 80 of the New York Civil Service Law in the inverse order of appointment.

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* Respondents herein are petitioners in *Civil Service Commission of the City of New York, et al.* v. *The Guardians Association of the New York City Police Department, Inc., et al.*, No. 81-432, filed August 31, 1981, which seeks review of the judgment of the Court of Appeals dated July 25, 1980, to the extent that it granted relief to the plaintiff class under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.* There has been no decision by this Court on the petition.

(2)

In May, 1975, the named petitioners herein filed charges of discrimination with the Equal Employment Opportunity Commission challenging the proposed layoffs as discriminatory against black and Hispanic police officers. On May 2, 1976, petitioners commenced this action on behalf of all black and Hispanic police officers laid off on June 30, 1975. Petitioners alleged that, but for the discriminatory examinations in 1968-70, they would have been appointed earlier and would have accrued sufficient seniority to withstand the layoffs. Petitioners argued that the layoffs were discriminatory in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.*, as well as 42 U.S.C. §§1981 and 1983.

After an evidentiary hearing, the District Court concluded that the examinations and their use after 1972 were discriminatory under Title VII and therefore the layoffs were discriminatory under Title VII. The Court further found that neither the examinations nor the layoffs were intentionally discriminatory and dismissed petitioners' claims under 42 U.S.C. §§1981 and 1983. The Court directed respondents to reorder the seniority lists to accord petitioners constructive seniority.

Respondents appealed from the preliminary injunction order. On June 21, 1977, the Court of Appeals vacated the injunction and remanded to the District Court for reconsideration in light of this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). *The Guardians Association of the New York City Police Department, Inc.* v. *Civil Service Commission of the City of New York*, 562 F. 2d 38 (2d Cir. 1977).

On remand, petitioners amended their complaint to assert a claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and redirected the focus of their complaint from the layoffs to the initial hiring, in view of *Teamsters*.

(3)

On February 27, 1979, the District Court again granted petitioners' application for a preliminary injunction. Having earlier found that the eligible lists were based upon examinations which did not satisfy Title VII standards, the Court held that the use of the lists after March, 1972 constituted a "discriminatory refusal to hire" in violation of Title VII. In accordance with *Teamsters*, only those black and Hispanic officers hired after 1972 had a claim under Title VII and relief could extend back only to 1972, the effective date of the Act.

The Court then held, however, that the Title VII "impact" standard was applicable to claims of employment discrimination under Title VI, rather than the constitutional "intent" standard. Therefore, since petitioners stated a claim of discriminatory refusal to hire under Title VII, they stated an identical claim under Title VI. And since Title VI became effective in 1964, all petitioners appointed from the 1968-70 examinations were eligible for relief. The Court adhered to its earlier decision dismissing petitioners' claims under 42 U.S.C. §§1981 and 1983.

Respondents again appealed from the preliminary injunction order to the Court of Appeals. By decision dated July 30, 1980, the Court of Appeals affirmed the District Court's holding on petitioners' claims under Title VII and 42 U.S.C. §§1981 and 1983, and reversed that portion of the District Court's opinion and order which held petitioners entitled to relief under Title VI.

Judge Meskill, writing for the Court of Appeals, held that there is no implied private right of action for compensatory relief under Title VI. Judge Kelleher concurred with Judge Coffrin in rejecting the Title VI claim on the ground that the appropriate standard for determining liability under Title VI is the constitutional intent standard, not the Title VII impact standard.

Petitions for rehearing, with suggestions for rehearing *en banc,* were filed by all parties. On June 1, 1981, the Court of Appeals denied both petitions.

Summary of Argument

I.

The fundamental issue presented in this case—the standard for establishing liability under Title VI of the Civil Rights Act of 1964—has been resolved by this Court in *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), and *Board of Education of the City School District of the City of New York* v. *Harris,* 444 U.S. 130 (1979). In both *Bakke* and *Harris* a clear majority of this Court concluded that Title VI incorporates the constitutional intent standard as set forth in *Washington* v. *Davis,* 426 U.S. 229 (1976).

The legislative history of Title VI is replete with references to Congress' identification of Title VI with constitutional standards. "The existing law of the land [was] stated in [Title VI]," and that law held actionable only conduct intentionally calculated to violate the Constitution. 110 Cong. Rec. 5254 (remarks of Sen. Humphrey). Congress was cognizant of the continuing evolution of the scope of the Equal Protection Clause and therefore re-

fused to provide a definition of discrimination in Title VI. As the concept of discrimination under the Constitution developed, Title VI would keep pace. Thus under constitutional standards, intent to discriminate must be established to make out a Title VI violation.

Neither the Stennis Amendment nor the failure of Congress to amend Title VI in 1966 supports the contention of petitioners and *amici* that Title VI incorporates an impact standard.

The regulations purportedly enacted under the authority of Title VI which set forth an impact standard are in conflict with the statute and are therefore neither binding nor entitled to any weight.

II.

Although the question of whether 42 U.S.C. §1981 embodies an impact standard or requires a showing of intent is one on which this Court has not expressly spoken, this Court has quite clearly, if only implicitly, indicated that the statute requires proof of intentional discrimination. Section 1981 has its roots in both the Thirteenth and Fourteenth Amendments and was designed to ensure equal protection of the laws. The Congress which originally enacted section 1981 in 1866 was concerned with the elimination of intentional discrimination and cannot be understood to have incorporated an impact standard first articulated by this Court more than 100 years later. Section 1981 must be construed in accordance with sections 1982, 1983 and 1985, each of which require proof of intentional discrimination.

POINT I

***In Regents of the University of California* v. *Bakke* and *Board of Education of the City School District of the City of New York* v. *Harris*, the majority of the members of this Court concluded that the standard for establishing a violation of Title VI is the constitutional intent standard. Title VI's legislative history provides conclusive support for this construction.**

(1)

An underlying issue in this controversy is whether Title VI provides a private remedy for injunctive relief and damages. Although discussed by the District Court (466 F. Supp. at 1281-1285) and by Judge Meskill in the Court of Appeals (633 F.2d at 255-263), this issue has not been addressed by the parties and was not one of the questions upon which *certiorari* was granted. Accordingly, it will not be discussed by respondents except to note that although *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and *Lau* v. *Nichols*, 414 U.S. 563 (1974), may be read as supporting the existence of a private right of action under Title VI, more recent decisions of this Court compel the opposite conclusion. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U.S. ——, 50 U.S.L.W. 4457 (May 18, 1982); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assoc.*, 453 U.S. 1 (1981); *Transamerica Mortage Investors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). *See also Bakke*, 438 U.S. at 283 (Powell, J.), 438 U.S. at 379-387 (White, J.), 438 U.S. at 419 (Stevens, J.). Title VI's sole emphasis on administrative enforcement (section 2000d-1) and the legislative history's exclusive concern with terminating funding to offending recipients support this view. As Representative Gill stated (110 Cong. Rec. 2467 [1964]):

> "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim."

(2)

In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), a majority of this Court concluded that Title VI imposes the constitutional intent standard for a finding of liability. Justice Powell held that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." *Id.* at 287. Justice Brennan, speaking for himself and Justices White, Marshall and Blackmun agreed, stating: "In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies." *Id.* at 328.

In *Board of Education* v. *Harris*, 444 U.S. 130 (1979), the majority stated that "[a] violation of Title VI may result in a cutoff of all federal funds and it is likely that Congress would wish this drastic result only when the discrimination is intentional." *Id.* at 150. The dissenters agreed "that Title VI prohibits only purposeful discrimination." *Id.* at 160 (Stewart, J.).

In *Bakke*, Justices Powell and Brennan relied upon Congress' refusal to incorporate any "static" definition of discrimination into Title VI in concluding that only intentional acts of discrimination were to be actionable under Title VI. *Id.*, 438 U.S. at 284 (Powell, J); *id.* at 337 (Brennan, J., concurring).

As Justice Brennan explained (*id.* at 338), by incorporating constitutional standards into Title VI, Congress did not wish to foreclose the development of Title VI by limiting its definition of discrimination to that which was violative of the Equal Protection Clause in 1964. Congress intended that, in addition to combating *de jure* discrimination, Title VI would keep pace with the Fourteenth Amendment's evolving definition of constitutionally prohibited discrimination as enunciated by this Court. Under this evolving standard the Equal Protection Clause's focus has shifted from *de jure* segregation to intentional segregation (*Keyes* v. *School District No. 1,* 413 U.S. 189 (1973)), but has never permitted discrimination to be premised on numerical racial disparities. *Washington* v. *Davis,* 426 U.S. 229 (1976). *Washington* holds that mere impact has never been held sufficient to establish a *prima facie* constitutional violation*. *Id.* at 239-240. *See also Davis* v. *Brinkman,* 433 U.S. 406 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Under these circumstances, the repeated references in Title VI's legislative history to eliminating constitutionally proscribed activities leads to the inescapable conclusion that only intentional misconduct is sufficient to establish a violation of Title VI.**

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* Congress must be presumed to have been familiar with this Court's interpretation of the scope of the constitutional proscription against discrimination when it enacted Title VI. *See Cannon* v. *University of Chicago,* 441 U.S. 696, 699 (1979); *infra* p. 15 (discussing *Simkins* v. *Moses Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. den.* 376 U.S. 938 [1964]).

** Petitioners and *amici* simply ignore *Bakke's* dispositive treatment of the definition of discrimination in Title VI when they

(Footnote continued on following page)

The comments by this Court in *Bakke* and *Harris* effectively repudiate any principles set forth in *Lau* v. *Nichols*, 414 U.S. 563 (1974), which identify Title VI with an impact standard,* and fully support the decision of the United States Court of Appeals in the instant case.

(Footnote continued from preceding page)

insist that the absence of a definition points to Congress' acceptance of an impact test. Pet. Br. 21-23; Legal Funds' Br. 5-7. They advance an analysis based upon Congress' refusal to act on the definition rather than the legislative history's clear explication of what Congress meant, and rely only on "isolated statements of various legislators taken out of context" to support their argument. *Bakke*, 438 U.S. at 284.

* Since *Bakke* and *Harris*, the overwhelming majority of federal courts have applied an intent standard to Title VI. *See, e.g.*, *Castaneda* v. *Richard*, 648 F. 2d 989 (5th Cir. 1981); *Bryan* v. *Koch*, 627 F. 2d 612 (2d Cir. 1980); *Lora* v. *Board of Education*, 623 F. 2d 248 (2d Cir. 1980); *Anderson* v. *Banks*, 520 F. Supp. 472 (S.D. Georgia 1981); *U.S.* v. *State of Texas*, 506 F. Supp. 405 (E.D. Texas 1981); *Schmidt* v. *Boston Housing Authority*, 505 F. Supp. 988 (D. Mass. 1981); *Harris* v. *White*, 479 F. Supp. 996 (D. Mass. 1979); *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256 (D. Conn. 1979). *Contra N.A.A.C.P.* v. *Medical Center, Inc.*, 657 F. 2d 1322 (3d Cir. 1981).

Prior to *Lau*, it had been recognized that "the same showing is required to establish a violation of 42 U.S.C. 2000d (Title VI), as is required to make out a racial discrimination violation of the Fourteenth Amendment's Equal Protection Clause." *Goodwin* v. *Wyman*, 330 F. Supp. 1038, 1040 n.3 (S.D.N.Y. 1971), *aff'd* 406 U.S. 964 (1972). *See also Jefferson* v. *Hackney*, 406 U.S. 535, 549-550 n.19 (1972) (where an intent test applicable to Title VI may be implied); *Taylor* v. *Cohen*, 405 F.2d 277, 281 (4th Cir. 1968); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. den.* 388 U.S. 911 (1967); *NAACP Western Region* v. *Brennan*, 360 F. Supp. 1006, 1012 (D.D.C. 1973); *Ward* v. *Winstead*, 314 F. Supp. 1225, 1235 (N.D. Miss. 1970) *appeal dismissed* 400 U.S. 1019; *United States* v. *State of Texas*, 321 F. Supp. 1043, 1056-57 (Tex. 1971); *United States* v. *Tatum Independent School Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969), *aff'd* 447 F.2d 441 (5th Cir. 1971).

(3)

Title VI was a product of Congress' concern over the unacceptably slow pace of desegregation required by *Brown v. Board of Education*, 347 U.S. 483 (1954). With Title VI Congress intended to prevent the disbursement of federal funds to recipients who were acting in a manner which violates the Equal Protection Clause, or, in the case of private recipients, would violate the Equal Protection Clause if done by the state. Congress never intended to provide a stricter standard than that established under the Equal Protection Clause. In introducing Title VI in the House, Representative Celler, the Chairman of the Judiciary Committee and floor manager of the Civil Rights legislation, stated (110 Cong. Rec. 1519 [1964]):

> "It would assure Negroes the benefit now accorded only white students in programs of higher education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association."

He later stated (*id.* at 2467):

> "In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.

> It is for these reasons that we bring forth title VI. The enactment of title VI, will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions."*

These remarks and those of other supporters of the House bill establish that Title VI was introduced to clarify for all recipients of Federal grants-in-aid that the Fifth and Fourteenth Amendments prohibit discrimination in such programs.** *See* 110 Cong. Rec. 2467 (1964) (remarks of Rep. Lindsey); *id.* at 2481 (remarks of Rep. Ryan). *See generally Hearings on H.R. 6890, 87th Cong. 2d Sess. before the Subcommittee on Integration in Federally Assisted Public Education Programs of the House Committee on Education and Labor*, at 14-15, 18, 20, 21, 32, 37-38.

The Senate debates on Title VI further demonstrate that Title VI was intended to provide a mechanism for terminating Federal funding to recipients engaged in conduct prohibited by the Equal Protection Clause. For example Senator Ribicoff stated (110 Cong. Rec. 13333 [1964]):

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* *See, e.g.*, the Hill Burton Act, 60 Stat. 104, as amended, 42 U.S.C. §291e(f) (1958). The Act was held unconstitutional in *Simkins* v. *Moses Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. den.* 376 U.S. 938 (1969), on the grounds that it promoted *de jure* discrimination. *See infra* p. 15.

** Representative Celler also filed a memorandum discussing the proposed Civil Rights Act. 110 Cong. Rec. 1251 (1964). In that memorandum it was urged that the Constitution mandated that the government prevent racial discrimination by the recipients of Federal aid; otherwise the government might become a partner in discrimination. *Id.* at 1527-1528. As stated in the memorandum, "* * * Congress clearly has the power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*

> "Basically, there is a constitutional restriction against discrimination in the use of Federal funds and title VI simply spells out the procedure to be used in enforcing that restriction.
>
> • • •
>
> Title VI implements these basic principles. It provides a fair and reasonable procedure for making sure that the Constitution is observed and for making sure that discrimination in the use of Federal funds is ended."

See also 110 Cong. Rec. 7102. Similarly, Senator Humphrey stated (110 Cong. Rec. 5254):

> "The existing law of the land is stated in section 601 [42 U.S.C. §2000d]. Sections 602 and 603 [42 U.S.C. 2000d-2 and 2000d-3] of H.R. 7152 do not represent an extension of that law. Those latter sections represent no new power."

He then went on to state (110 Cong. Rec. 5254):

> "So what does section 601 do? It states the law, it repeats the law • • •."

See also 110 Cong. Rec. 5252, 5865, 13442 (remarks of Sen. Humphrey).

The colloquy between Senators Pell and Pastore also provide evidence that Title VI was not intended to provide any rights other than those already established under the Equal Protection Clause (110 Cong. Rec. 7064):

> "Mr. Pell: It is not true that the philosophy of title VI is already in the law? The authority is permis-

> sive. Title VI would merely extend it, but would not bring in a new concept. Is that correct?
>
> Mr. Pastore: The Senator is correct."*

The congressional debates leave no doubt that the type of discrimination which motivated Title VI's introduction and passage was *de jure* discrimination and that the purpose of Title VI was to enforce the existing law prohibiting this conduct. The examples of discrimination cited by Title VI's proponents as coming within its prohibitions can all be traced to official, *de jure* conduct. *See, e.g.*, 110 Cong. Rec. 2480-2482 (remarks of Rep. Ryan). The proponents repeatedly expressed their abhorrence of funding school systems which refused to eradicate the vestiges of *de jure* discrimination (*e.g.*, 110 Cong. Rec. 2732 [remarks of Rep. Dawson]) and with the Hill-Burton Act (60 Stat. 1041) to the extent that it authorized separate but equal hospital services (*e.g.*, 110 Cong. Rec. 2468 [remarks of Rep. Celler]; 110 Cong. Rec. 2595 [remarks of Rep. Donohue]). *Simkins* v. *Moses Cone Memorial Hospital*, 232 F.2d 959 (4th Cir. 1963), *cert. den.* 376 U.S. 938 (1964), which held Hill-Burton's *de jure* discriminatory provision unconstitutional was repeatedly discussed in the debates and Congress clearly intended Title VI to be a permanent rebuke to Hill-Burton's discriminatory heritage.

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* *See also* 110 Cong. Rec. 7102 ("Title VI does not create any legal or administrative powers") (remarks of Sen. Javits); *id.* at 7057, 7062 (remarks of Sen. Pastore); *id.* at 12675, 12677 (remarks of Sen. Allott); *id.* at 13333 (remarks of Sen. Morse).

(4)

Recognizing the infirmity of their claim that Congress did not incorporate a constitutional standard in Title VI, *amici* Civil Liberties Unions argue alternatively that the constitutional standard that pertained in 1964 contemplated the use of statistical disparities to establish a *prima facie* case of racial discrimination. Civil Liberties Unions' Br. 23-36. *Amici* seek support for this assertion from decisions of this Court in the areas of apportionment, jury selection and school desegregation. As discussed above, *Washington* v. *Davis*, 426 U.S. 229 (1976), requires that *amici's* argument be rejected out of hand. *Washington* held that the Court had never relied on a disparate impact test in its constitutional rulings. But even to the extent that there is language in the cases *amici* cite which predicates a finding of discrimination on the basis of statistical disparities, that too is consistent with *Washington*. In *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court recognized that although statistics are not sufficient to establish a *prima facie* constitutional violation, there may be cases where the disparities are so extreme that intent may be inferred. *Id.* at 264-267.

Moreover, in *Washington*, this Court relied upon decisions in the areas of reapportionment and jury selections in support of its holding that intent to discriminate is the prerequisite for a *prima facie* constitutional violation. *Washington*, 426 U.S. at 239-240, *citing Wright* v. *Rockefeller*, 376 U.S. 52 (1964) (intent required to sustain constitutional attack on apportionment statute); *Akins* v. *Texas*, 325 U.S. 398, 403-404 (1945) (unlawful exclusion of jurymen must be proven by intent to discriminate). *Amici's* reliance on cases (Civil Liberties Unions' Br. pp. 23-36) from the same areas to reach the opposite conclusion is

without merit. Moreover, *amici's reliance on Griffin* v. *County School Board,* 377 U.S. 218 (1964), in support of their claim that this Court has inquired into discriminatory impact alone in a school desegregation case, is misplaced. It is unmistakable from Justice Black's decision in *Griffin* that the Court found that the school board's actions were intentionally calculated to obstruct the mandate set forth in *Brown* v. *Board of Education. Griffin,* 377 U.S. at 231.

(5)

Amici Civil Liberties Unions argue that the codification in 1972 of the "Stennis Amendment" in Title VI (42 U.S.C. §2000d-6)* and the Emergency School Aid Act ("ESAA") (20 U.S.C. §1602) (see generally *Harris,* 444 U.S. at 144-145) mandates the incorporation of an impact test under Title VI. *Amici* argue that, since *Harris* relied on the Stennis Amendment in applying an impact test to ESAA, its codification in Title VI supports petitioners' argument that Title VI, as well, incorporates an impact standard.

Any argument that 42 U.S.C. §2000d-6 requires the inclusion of an impact test in Title VI was conclusively rejected by this Court in *Harris.* The majority distinguished the version of the Stennis Amendment codified in Title VI from the version incorporated in ESAA and ruled that section 2000d-6 supports *Bakke's* adoption of an intent test for Title VI. *Harris,* 444 U.S. at 146-47 n. 10. The dissent concurred, so far as Title VI was concerned, that section 2000d-6 was consistent with the incorporation of the intent standard in Title VI. *Harris,* 444 U.S. at 160 n. 5. Accordingly, *amici's* argument is meritless.

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*42 U.S.C. §2000d-6 was not an amendment to Title VI. It was an amendment to Section 182 of the Education Amendments of 1972 which was codified in section 2000d of Title 42.

The Stennis amendment contained no substantive legal standards for determining discrimination. It was essentially an empty accommodation to southern congressmen who were distressed over the aggressive pace of school desegregation activities in the south, while northern *de facto* discrimination was not subject to close court scrutiny. Senator Stennis and his supporters actually wished to "slowdown" desegregation activities in their localities by adopting a policy statement in ESAA which essentially asked that desegregation activities in the south be conducted at the same slow pace as that of the north. *See* 117 Cong. Rec. 11509 (1971) (remarks of Sen. Stennis); *see also id.* at 11508. This is precisely the reason that Senator Mondale opposed the Stennis Amendment. *See* 117 Cong. Rec. 11517-11518 (remarks of Sen. Mondale); *see generally Harris,* 444 U.S. at 145 and n. 8.

The Stennis Amendment was an artful yet ill-fated attempt to disrupt the mandate of *Brown* v. *Board of Education.** Its significance lies solely in revealing the

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* Senator Stennis virtually stated as much (117 Cong Rec. 11509):

> "What is the matter with this proposal? Why should not Congress light just one little lamp that might shed some light whereby the officials could find their way? *I believe there has been so little activity beyond the South, and so many years have passed and so many promises have been made, that somewhere down the line there should be a slowdown signal,* and I think Congress is one branch of Government that at least can light that little candle. It is very small. Some say this proposal does not have any meaning. Well, if it does not have any meaning, it will do no harm. But I think it does have meaning. I think there is a great principle behind it.
>
> [The Stennis Amendment] does not set any time table. It does not call for any drastic action. It just says that the policy applied by HEW ought to be nationwide." (Emphasis supplied.)

strong feelings over desegregation which still gripped Congress almost twenty years after *Brown*, and in exemplifying how with artful draftsmanship conflicting ideas may find support in the same language and thus legislative acceptance.* But in no case can the Stennis Amendment be construed so as to support the application of the more liberal disparate impact test to Title VI.** Its underlying purpose cannot be disregarded and it cannot be a predicate for radically expanding the scope of Title VI.

(6)

Petitioners find it significant that Congress rejected a 1966 proposal which would have amended Title VI to provide *inter alia* that a funding termination would be permissible only where a provision of the Constitution had been violated.*** From this congressional inaction peti-

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* For example, Senator Ribicoff supported the Stennis Amendment because it "would at least declare a policy of integration in the North as well as the South." 117 Cong Rec. 11511. *Compare* 117 Cong. Rec. 11517-11518, 11519 (remarks of Sen. Mondale).

** Senator Javits opposed the Stennis Amendment since he feared it would, if anything, emasculate enforcement of Title VI. *See* 117 Cong. Rec. 10760-10761.

*** The proposal was introduced as an amendment to H.R. 14765, a bill to amend the 1964 Civil Rights Act. The proposal was defeated (112 Cong. Rec. 18715) but the bill passed the House. 112 Cong. Rec. 18740. In the Senate Judiciary Committee the proposal was introduced as an amendment to S. 3296, a parallel bill to H.R. 14765. Neither the proposal nor S. 3296 emerged

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from committee. Rather the House-passed version was placed directly on the Senate calendar (112 Cong. Rec. 19/4, and was ultimately defeated. 112 Cong. Rec. 23043.

The amendment provided:

> Sec. 603. Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) is amended by adding at the end thereof the following new section:
>
> Sec. 606(a) Nothing contained in this title shall be construed to authorize the termination of, or the refusal to grant or continue, any Federal financial assistance for any cause other than a violation of a provision of the Constitution, or an affirmative provision of a statute of the United States which has been established by substantial evidence.
>
> (b) No rule, regulation, or order which may result in the termination of, or the failure to grant or continue, any Federal assistance shall be placed in effect unless it has been adopted after proceedings taken in compliance with the requirements of sections 4-10, inclusive, of the Administrative Procedure Act.
>
> (c) A determination under this title to the effect that discrimination on the ground of race, color, or national origin exists, has existed or in the future may exist, in the administration of any program or activity shall require a showing by substantial evidence that in the administration or operation thereof, conditions or requirements, are, have been or may be imposed with affirmative intent to exclude, or with the necessary effect of excluding, individuals from participation in the benefits of such program or activity solely upon the ground of race, color, or national origin.
>
> (d) Nothing contained in this title shall be construed to authorize any Federal department, agency, or officer to

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tioners boldly conclude (Br. pp. 24-26) that in 1964 Congress must have incorporated a disparate impact standard in Title VI.

Petitioners' reliance on the defeat of the 1966 amendment to prove that the contrary must have been contemplated in 1964 is a highly suspect approach to statutory interpretation, one that has generally been discredited by this Court. *See Bryant* v. *Yellen*, 444 U.S. 978 (1980); *Ernst and Ernst* v. *Hochfelder*, 425 U.S. 185, 203 n. 24 (1976); *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 n. 11 (1969); *United States* v. *Wise*, 370 U.S. 405, 411 (1962).* This is especially true in the instant case

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issue any rule, regulation, or order for the purpose or with the effect of—

(1) Controlling or regulating the administration or operation of any such school, hospital, or other institution for any purpose other than to provide equal opportunity for access thereto by individuals without regard to race, color, or national origin, or

(2) depriving any class of individuals of the privilege of determining voluntarily whether or not to avail themselves of any benefit provided by any program or activity, or of the facilities of any school, hospital, or other institution.

112 Cong. Rec. 10062, 18701.

* Similarly, many lower courts have held that the amendment-rejection theory has little probative value, if any, as to legislative meaning. *See Wisdom* v. *Norton*, 507 F. 2d 750, 757 (2d Cir. 1974); *State Highway Comm. of Missouri* v. *Volpe*, 479 F. 2d 1099, 1117 (1973); *Pacific Legal Foundation* v. *Goyan*, 500 F. Supp. 770, 775 (D.C. Md. 1980); *Mercy Hospital* v. *Rate Setting Com'n.*, —— Mass., ——, 407 N.E. 2d 337, 341-42 (App. Ct., Mass. 1980); *People* v. *Boyd*, 594 P. 2d 484, 490, 155 Cal. Reptr. 367 (1979); *Prince George's Cty.* v. *State Com'n, Etc.*, 40 Md. App. 473, 392 A.2d 115 (1978).

where the amendment addressed a variety of issues. It was designed to enforce the procedural safeguards already contained in Title VI (§606(b)), restrict federal regulation of local schools and hospitals (§606(d)(1)), and preserve the right of an individual to voluntarily decide whether to avail himself of federal funds (§606(d)(2)). The bill's failure could have been due to some, all or perhaps none of these provisions (*see U.S.* v. *Wise*, 370 U.S. at 405), and neither the parties nor the Court have any means of knowing what, if anything, in particular led to the bill's rejection. *Cf.* 2A Sutherland, Statutory Construction §48.18 at 224 (4th ed. 1973). The legislative history to the bill provides no conclusive answer to this question. Indeed, petitioners concede that the bill's proponents believed that the amendment would not change the original intent of Congress in enacting Title VI (Pet. Br. 24-5) and thus a conclusion that the bill was rejected as superfluous would be as reasonable as any. *See Mercy Hospital* v. *Rate Settling Commission*, —— Mass. ——, 407 N.E. 2d 337 (App. Ct. Mass. 1980); 2A Sutherland, Statutory Construction §48.18 at 224 (4th ed. 1973).

Moreover, discerning the cause of the amendment's defeat by looking to statements made in opposition to it, as petitioners attempt to do, is unavailing. As this Court stated in *Ernst and Ernst* v. *Hochfelder*, 425 U.S. 185, 205 n.24 (1976):

> "Remarks made [by opponents of legislation] in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. [Citations omitted.] This is especially so with regard to the statements of legislative opponents who '[i]n their zeal to defeat a bill . . . understandably tend to overstate, its reach.'"

Consequently the remarks of Representatives Rodino and Katsenmeier, which form the essence of petitioners' argument, must be viewed in the adversarial context in which they were made and do not present a reliable basis for inferring congressional intent.*

If anything, the 1966 legislative debates on Title VI support our construction of the provision. Unlike statements made in opposition to legislation, statements made in support of legislation carry significant weight in ascertaining legislative intent. *Ernst and Ernst*, 425 U.S. at 205 n. 24; *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964). Specifically with respect to questions raised concerning the definition of statutory language, answers given by sponsors of legislation are entitled to great deference. *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587, 600 (D.C. Cir. 1974). During the floor debates over the 1966 Civil Rights bill the sponsors were called upon to explain the scope of the concept of discrimination as they intended it in 1964.** The response given by Rep-

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* Even if the rejection of an amendment by the entire legislative body bears some significance to statutory intent, the failure of a legislative committee to act favorably on a legislative proposal is of negligible value in ascertaining the congressional will. *See Order of Railroad Conductors of America* v. *Swan*, 329 U.S. 520, 529 (1947); *Maiter* v. *Chicago Bd. of Ed.*, 77 Ill. App. 3d 389, 395 N.E. 2d 1162 (1979). In this case any reasoned consideration of the amendment's non-emergence from Committee is precluded by the fact that the Senate Judiciary Committee never even acted on the entire 1966 Civil Rights bill. Rather, the House passed version of the bill was placed directly on the Senate calendar as a substitute bill. See *supra* p. 20.

** While the courts disagree over how much weight to accord subsequent statements declaring the intent of an earlier statute,

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resentative Celler, the sponsor of both the 1964 and 1966 Civil Rights Acts to Representative Waggonner's demand for a definition of the term discrimination is thus probative of the meaning Congress sought when they passed Title VI (112 Cong. Rec. 16844):

> "Mr. Waggonner: The gentleman speaks of balance. Is he advocating a percentage balance, a true percentage balance by race . . .?
>
> Mr. Celler: There is no percentage in this bill at all. Each case of discrimination would have to be considered by the *cause*." (Emphasis added.)

Despite the support for our position in the 1966 legislative history, the Court's inquiry need go no further than Congress' debates over the original legislation. The 88th Congress left no doubt that only constitutionally proscribed conduct would be violative of Title VI.

(Footnote continued from preceding page)

(*compare Russ* v. *Wilkins*, 624 F. 2d 914 (9th Cir. 1980), *cert. den.* 451 U.S. 908 (1981) [consideration is given to subsequent legislation declaring the intent of a previous enactment] with *National Citizens Committee for Broadcasting* v. *F.C.C.*, 555 F. 2d 938, 952 n. 41 (D.C. Cir. 1977) [history of subsequent legislative activities is not useful in determining meaning of original legislation when enacted]), most courts give significant weight to subsequent statements made by the sponsors of the earlier legislation. This is particularly so when the later statements are made in the course of discussing a related piece of legislation. *See Glidden Company* v. *Zdanok*, 370 U.S. 530, 541-42 (1962); *United States* v. *General Motors Corp.*, 518 F. 2d 420 (D.C. Cir. 1975).

(7)

Petitioners' argument (Br. pp. 29-31), that, even if the statute incorporates an intent test, Title VI's regulations incorporating an impact test must be sustained is without merit.* Administrative authority to promulgate regulations is strictly circumscribed by the will of Congress. Our system of separation of powers forbids the executive branch of government from utilizing its regulatory authority to defeat legislative intent. *See Hampton & Co.* v. *U.S.*, 275 U.S. 394, 406-407 (1928). This doctrine is at the core of the Court's holdings that agency regulations are entitled to deference only if they are "reasonably related to the purpose of the enabling legislation." *Mourning* v. *Family Publication Services, Inc.*, 411 U.S. 356, 369 (1973), *quoting Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969).

---

* Petitioners also claim that this Court should defer to the administrative standard for determining discrimination. Pet. Br. 27-29. But as petitioners themselves recognize, deference should be given to the administrative interpretation "unless there are compelling indications that it is wrong. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). This Court's recognition in *Bakke* and *Harris* that Congress incorporated constitutional standards in Title VI requires that the administrative interpretation be rejected.

It is also incorrect for petitioners to claim (Br. pp. 31-32) that since as a condition of receiving federal funds, respondents "agreed" to abide by the Title VI regulations, this "agreement" constitutes an independent basis to uphold the application of an impact standard in this case. It is elementary that once the regulations upon which this "agreement" was predicated are found to be unenforceable, respondents must be relieved from adherence to any illegal conditions.

There is no litmus test for determining "reasonable relation." But clearly, regulations imposing an impact test on Title VI are irreconcilable with the statute. Title VI's proponents insisted that "[t]he existing law of the land is stated in [Title VI]." 110 Cong. Rec. 5254 (remarks of Sen Humphrey). It "would not bring in a new concept." *Id.* at 7064 (remarks of Sen. Pell). The federal largess was to be withheld from those engaged in constitutionally proscribed activities. Accordingly, regulations which hold actionable conduct plainly unreachable by the Constitution (*cf. Washington* v. *Davis*) are inconsistent with a statute founded on constitutional standards. Under such circumstances, the Title VI regulations incorporating an impact standard are unenforceable and must be stricken.*

---

* Petitioners' claim that Congress "endorsed" Title VI"s impact regulations in section 110 of the Public Works Employment Act of 1975 ("PWEA"), 42 U.S.C. §6709, is entirely speculative. Pet. Br. 28. There is nothing to indicate that Congress intended to sanction an effects standard when it directed that the prohibition of sex discrimination in PWEA be "enforced" through regulations "similar" to those promulgated under Title VI. Rather, it is far more realistic to conclude that Congress simply wished federal agencies implementing PWEA to adopt the detailed administrative enforcement mechanism already established for Title VI (*e.g.*, 45 C.F.R. Part 80). Section 6709's focus on remedial procedures, rather than a definition of discrimination, is apparent from the provision's last sentence which authorizes a "discriminatee" to pursue other available remedies in addition to the Title VI procedures. Petitioners' conclusion that section 6709 was intended to validate any particular provision of the elaborate Title VI regulations is unwarranted.

POINT II

Proof of discriminatory intent is necessary to the establishment of a violation of 42 U.S.C. §1981.

In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court held that 42 U.S.C. §1983 incorporated the constitutional intent standard as a prerequisite to a finding of liability. The Court specifically noted that the plaintiffs there relied upon 42 U.S.C. §1981, as well as a section of the Washington,D.C. Code, in arguing that the challenged employment practice was unlawful. *Washington*, 426 U.S. at 233. Indeed, in footnote 2 of the opinion (*id*), section 1981 was quoted in its entirety. *See also id.* at 248, 255 (Stevens, J. concurring), and *id.* at 257 (Brennan, J., dissenting).

As we read the Court's decision in *Washington*, it constitutes, albeit implicitly, an unequivocal holding that section 1981 requires a showing of intent similar to that required to make out a constitutional violation. If that is not so, then the Court in that case need not, and should not, have reached the constitutional issue (*see New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 [1979]), and at least some discussion of this statutory ground for relief should have been found in this Court's opinion. Instead, the Court stated, cryptically, but apparently not unthinkably, that the plaintiffs there "were entitled to relief on neither constitutional nor statutory grounds." *Washington*, 426 U.S. at 248.

Quite apart from what may be the precedential effect of *Washington* v. *Davis* on this issue, the legislative history precludes petitioners' argument that section 1981 was intended to render unlawful facially neutral government actions without proof of discriminatory motivation.

Section 1981 is a post-Civil War Reconstruction Era statute originally enacted in 1866 to enforce the Thirteenth Amendment and extend to blacks the same right to make and enforce contracts enjoyed by white citizens—that is, equal rights under the laws. It was subsequently reenacted as part of the Civil Rights Act of 1870 designed to implement the Fourteenth Amendment.

The present language of both sections 1981 and 1982 were originally part of Sec. 1 of the 1866 Civil Rights Act, which provided:

> ". . . citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, * * * shall have the same right, in every State and Territory in the United States, *to make and enforce contracts,* to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, and convey real and personal property,* and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." (Emphasis added.)

In later codifications, the language pertaining to the right to make and enforce contracts was retained in section 1981, and the language relating to the right to purchase, lease and convey real or personal property was transposed to a new section enumerated as section 1982. In interpreting what the present language of section 1982 was intended to prohibit, the Court in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 426 (1968), stated:

> "Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that Sec. 1 was meant to prohibit all racially *motivated* deprivations of the rights enumerated in the statute. . . ." (Emphasis added.)

Two statutes enacted at the same time, sharing the same congressional goals and the same Civil Rights Act, and utilizing essentially the same language, particularly the operative phrases under which certain forms of discrimination are actionable; to wit, "to make and enforce contracts," and "to . . . purchase, lease, sell . . . and convey real and personal property" must be considered *in pari materia* and construed accordingly. The parity of construction between sections 1981 and 1982 is further supported by this Court's finding in *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 440 (1973) (a case involving an express racial exclusionary policy), that:

> "In light of the historical interrelationship between Sec. 1981 and Sec. 1982, there is no reason to construe these sections differently when applied to these facts to the claim of *Wheaton-Haven* that is a private club."

Additional support for the conclusion that section 1981 is an equal protection constitutionally based statute requiring proof of discriminatory intent is provided by this Court's decision interpreting section 1985(3), enacted as part of the 1871 Act, in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). In *Griffin*, the Court in holding that section 1985(3) was premised on the 13th Amendment and that a required element of a cause of action under that statute was invidious discriminatory intent stated (403 U.S. at 102):

> "The constitutional shoals that would be in the path of interpreting Sec. 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 1797. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

The various statutes comprising the Civil Rights Act of 1866 and 1871 should be construed consistently in regard to the standard of liability. As this and other related cases demonstrate, there is a need to harmonize section 1981 with the liability standards under sections 1982, 1983 and 1985(3), as well as the United States Constitution. All of these statutes as well as the 13th and 14th Amendments were enacted during the same historical period in the form of equal protection legislation. Discriminatory intent is the established standard under the Constitution and in employment discrimination cases under section 1983; likewise, it is a required element of proof under section 1982 (*Jones* v. *Mayer*, 392 U.S. 409 (1968) and 1985(3) (*Griffin* v. *Breckenridge*, 403 U.S. 88 [1971]). The same principle pertains to section 1981. Neither legislative nor judicial precedent justifies a different treatment of section 1981 in general, and certainly not in the limited area of employment.

While it is true that some of the "Black Codes" enacted in the early Reconstruction Era appeared neutral on their face, it was obvious to Congress as well as the military occupational government that these statutes were enacted with a purposeful discriminatory intent and were designed to place the newly freed blacks in a position subservient to their former masters. In seeking to provide "practical freedom" to blacks, Congress, in passing section 1981, recognized that emancipation was meaningless without the legal right to contract, and to buy, sell and own real and personal property. It does not follow, however, that Congress had in mind concepts that evolved 100 years later under Title VII, a uniquely designed employment discrimination statute.

Indeed, in *Washington* v. *Davis*, 426 U.S. at 248, this Court expressly declined to extend the impact standard to other areas and statutes less expressly provided for by law, and stated:

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." [Footnote omitted.]

Under petitioners' expanded view of section 1981, neutrally phrased criminal statutes or vagrancy laws enacted without any intent to discriminate would today violate the statute if in operation they had a disparate impact on minorities. Conceivably, under petitioners' reading of the

statute, it would impact on private sellers of goods and services, as well as employers, providing only that the challenged practice, whether it be pricing policy or marketing strategy, or other business practice, produced a disparate impact, and requiring in such cases that the private actor show a business justification for his conduct. Indeed, taking petitioners' argument to its logical extreme, we can envision the use of section 1981 to challenge student recruitment policies of private colleges and universities, the pricing policies of hospitals and doctors and other professionals, and in short reaching into all areas of private contractual relationships where economic or other disabilities correlated with race undoubtedly disproportionately affect different segments of our application.

Because the logic of petitioners' argument seems necessarily to carry this far, their argument must be rejected. However radical the Radical Republicans of 1866 may have been, they certainly were not this radical.

CONCLUSION

The order appealed from insofar as it is being reviewed on the instant petition should be affirmed, with costs.

May 26, 1982.

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the City of New York,
Attorney for Respondents.

LEONARD KOERNER,
JUDITH A. LEVITT,
GREGG M. MASHBERG,
SUSAN D. WAGNER,
of Counsel.

Petitioner's Reply Brief

No. 81-431

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

CHRISTOPHER CROWLEY
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

Of Counsel:

JUNE ROSE
JOAN GUGGENHEIMER
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

KENNETH KIMERLING
CESAR A. PERALES
Puerto Rican Legal Defense and Education Fund, Inc.
95 Madison Avenue
New York, New York 10016
Tel.: (212) 532-8470

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REPLY BRIEF FOR PETITIONERS

Introduction

The issue presented* on this writ of certiorari was previously decided by this Court in *Lau* v. *Nichols,* as respondents (hereinafter "defendants") acknowledge in their brief (Br. for Resp. at 11). The decision in *Lau* is consistent with the remedial purposes and broad language of

* Petitioners (hereinafter "plaintiffs") sought review in this Court of two issues: (1) whether proof of intent to discriminate is required to establish a *prima facie* case under Title VI of the Civil Rights Act of 1964; and (2) whether proof of intent to discriminate is required to establish a *prima facie* case under 42 U.S.C. § 1981. This Court decided the second of these two issues last term in *General Building Contractors Association, Inc.* v. *Pennsylvania et al.,* 102 S.Ct. 3141 (1982).

Title VI, with its legislative history, and with the uniform and long-standing interpretation of the statute by the administrative agencies charged with its enforcement. Moreover, and particularly relevant in this employment discrimination case, the use of an impact standard in actions under Title VI is consistent with the standard applied in employment discrimination cases under Title VII of the Civil Rights Act of 1964.

Defendants now ask that this Court repudiate the majority and concurring opinions in *Lau* v. *Nichols* and invalidate agency regulations that have been in effect for almost 18 years by requiring proof of intent to discriminate as part of a prima facie case under Title VI. Defendants' attempts to justify imposing this additional burden on plaintiffs are wholly unpersuasive.

First, as plaintiffs demonstrated in their main brief, the remedial purposes, broad language, and legislative history of Title VI support the use of an impact test. Title VI was enacted as part of a sweeping package of remedial measures, the Civil Rights Act of 1964. Its purpose was not to punish people who harbored an intent to discriminate, but to ensure that unlawful discrimination is not supported by taxes paid by all the people. Defendants argue only that Congress, in debating Title VI, made reference to the Constitution and to this Court's decisions holding segregation to violate the Fourteenth Amendment. Plaintiffs do not deny that Title VI was intended to eradicate, *inter alia*, the kind of blatant discrimination in federally-funded programs which would be prohibited even under an intent standard. It does not necessarily follow, however, that Congress intended Title VI to reach *only* the most blatant forms of discrimination. In fact, Congress rejected the suggestion of some Members that Title VI's coverage be *restricted* to intentional discrimination (Br.

for Pet. at 21-23). Moreover, where Congress wished to incorporate a constitutional standard into a statute, as in Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a), it did so explicitly. Defendants do not address this evidence that Congress intended to deny federal funding to a broader category of discrimination.

Plaintiffs also demonstrated in their main brief that Congress approved the use of an impact standard in 1966. In response, defendants urge only that such evidence of subsequent legislative action should not be given substantial weight. Defendants make no response at all to the argument that Congress' action in 1966 also constituted approval of the impact standard incorporated in agency regulations.

Defendants' contention that the regulations are not reasonably related to the statute is similarly unpersuasive. Indeed, defendants fail to acknowledge that this Court relied on an almost identical regulation in *Lau* v. *Nichols*, and has upheld the reasonableness of statutes applying an impact test as a means of enforcing the Constitution.

Finally, defendants' argument that this Court overruled *Lau* in *Bakke* or *Harris* should be rejected. Those decisions addressed different issues from the issue presented in this case, and are not necessarily inconsistent with *Lau*.

Congress' particular concern with equality of employment opportunity is evident from both the legislative history of Title VI and from Title VII of the Civil Rights Act of 1964, in which Congress, recognizing that the use of arbitrary employment standards constitutes a barrier to the achievement of equal opportunity, placed on the employer the burden of showing that any practice with a disparate impact on minorities bears "a manifest relationship to the employment in question." *Griggs* v. *Duke Power*

Co., 401 U.S. 424, 432 (1971). The decision of the Court of Appeals below not only allows defendants to use arbitrary employment standards which adversely impact on minorities, but allows them to do so *with the assistance of federal funding*. To affirm that decision is to "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 513 (1981).

ARGUMENT

POINT I

An Impact Standard Is Consistent With the Legislative History of Title VI.

A. Congress Did Not Intend to Limit the Application of Title VI to Intentional Discrimination

Defendants contend that Congress intended Title VI to provide no stricter a standard than that prevailing under the Equal Protection Clause (Br. for Resp. at 12). As the legislative history makes plain, however, Congress declined so to define or limit the term "discrimination" in Title VI. Despite the sharp concern of Title VI's opponents that the lack of any definition of discrimination would give too much power to federal agencies, Congress did not limit the agencies' powers other than by requiring that agency regulations be "consistent with the objectives of the statute authorizing financial assistance." Section 602, 42 U.S.C. § 2000d-1. Congress did, however, provide that all regulations had to be affirmatively approved by the President, an unusual step which indicates how heavily Congress intended to rely on those regulations.

In an attempt to support their argument that Congress specifically intended to limit Title VI to instances of inten-

tional discriminaton, defendants rely on a number of scattered references in the Congressional debate to the Constitution. Defendants thus do precisely what they charge plaintiffs with doing—they "rely only on 'isolated statements of various legislators taken out of context' " (Br. for Resp., 10-11 at **). We submit that defendants' reliance is misplaced for two principal reasons. First, as plaintiffs pointed out in their main brief, many of the references to the Constitution were made in speeches seeking to bolster the constitionality of the Act in the face of an attack by its opponents (Br. for Pet., 19 at *). As a matter of oratorical argument, the supporters of the Act laced their speeches with constitutional references. To excerpt these speeches, out of context, lends little support to an argument that Congress was *only* concerned with constitutional violations.

Second, it was by no means clear in 1964 that the Constitution mandated an intent standard in discrimination cases. Defendants appear to assume that congressional concern, in 1964, with the elimination of "unconstitutional" discrimination limits the intended scope of Title VI to intentional discrimination. As demonstrated by amici The American Civil Liberties Union and The New York Civil Liberties Union, however (Br. at 23-36), the Fourteenth Amendment standard in 1964 was, at best, unclear. Indeed, regardless of whether *Washington* v. *Davis* was consistent with the prior decisions of this Court (*see* Br. for Resp. at 16-17), this Court itself recognized in *Washington* that various Courts of Appeals had held that disproportionate impact "standing alone and without regard to discriminatory purpose" was sufficient to prove a constitutional violation absent substantial justification. *Washington* v. *Davis*, 426 U.S. 229, 244-45 & n.12 (1976).

Defendants' reliance on references in the debates to "existing law", like their reliance on references to "the Con-

stitution", is also misplaced. Certainly, the Fourteenth Amendment's prohibition of segregation was understood to be the law. The debates also make clear however that, to the proponents of the 1964 bill, "existing law" included the executive's power to attach conditions to federal grants and Congress' power to do the same under the Spending Power. *See, e.g.*, 110 Cong. Rec. 7062-63 (remarks of Sen. Pastore); *id.* at 2467-68 (remarks of Rep. Celler).

At most, defendants' references to the debates indicate no more than that Congress was concerned with segregation, a fact which plaintiffs do not dispute. The issue, however, is not whether Title VI prohibits intentional discrimination or segregation in federally-funded programs, but rather whether Congress intended to limit the statute's coverage to only those types of discrimination. As was demonstrated in plaintiff's main brief, the legislative history shows that Congress intended to exercise the full extent of its power in order to eradicate a broad range of discriminatory practices (Br. for Pet. at 16-21). In accordance with that goal, Congress specifically *declined* to limit the statutory prohibition against discrimination and directed the federal agencies to issue regulations so as to enforce the statute's broad prohibition (Br. for Pet. at 21-23).

B. Congress Approved the Administrative Interpretation of Title VI

In 1966, Congress rejected a proposed amendment to Title VI. The amendment, which would have incorporated an intent test in Title VI and overturned the interpretation given the statute by a number of administrative agencies, never emerged from the Senate Judiciary Committee and was defeated in the House (Br. for Pet. at 24-26).

Defendants object to the significance of the defeat of this amendment, arguing (1) that the statements of Representatives Kastenmeier and Rodino were made in opposition to

the amendment and therefore should be given little weight; and (2) that the defeat of legislation is of little consequence in discerning the intent of Congress. Defendants' arguments fail to address the most significant aspects of this evidence of legislative intent.

Contrary to defendants' first contention, the statements of a bill's opponents are indeed of value in discerning Congressional intent. *Bryant* v. *Yellen*, 447 U.S. 352, 376 (1980); *see Patsy* v. *Board of Regents*, 102 S. Ct. 2557, 2562-63 nn. 6, 7, 9 (1982). More importantly, Representatives Kastenmeier and Rodino were not merely opponents of the proposed amendment. Both legislators were members of the House Judiciary Committee, which had reported the 1964 civil rights bill, and had been members of the subcommittee that held 22 days of hearings and 17 days of mark-up on the bill. H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2392. They were strong proponents of the 1964 Act and were very familiar with its purpose. Moreover, Representative Kastenmeier had been a member of a special subcommittee of the Judiciary Committee, which was formed in the fall of 1965 to examine the administration and application of the civil rights laws, including Title VI. 112 Cong. Rec. 18705 (remarks of Rep. Kastenmeier). The subcommittee had met with agency representatives and with Southern governors and attorneys general—"all people concerned with the administration" of, *inter alia*, Title VI. *Id.* Representative Kastenmeier thus was well acquainted with the interpretation and implementation efforts of the administrative agencies and was eminently qualified to speak about the effect of the proposed amendment on Title VI. His opinion that an amendment imposing an intent requirement would be contrary to the purpose of the 1964 statute is entitled to great weight.

In addition, this Court has recognized that the rejection of an amendment which is intended to overturn the administrative construction of a statute provides persuasive evidence that the administrative construction reflects the will of Congress. In *Board of Education* v. *Harris*, 444 U.S. 130, 148-49 (1979), for example, this Court considered the effect of the reenactment in 1978 of the Emergency School Aid Act of 1972. In the intervening years, the then-Department of Health, Education and Welfare had issued a funding eligibility regulation which rejected applicants whose teacher assignments were discriminatory in effect, regardless of intent. The regulation was brought to Congress' attention through a proposed House amendment in 1978 (defeated in conference) which would have provided for a waiver of the regulation in certain cases. *Id.* at 148. Moreover, an amendment urged at the time of reenactment by a Senate Subcommittee witness, which would have required a finding of intentional discrimination, was not adopted. This Court concluded that the failure to amend the statute "strongly suggests that Congress acquiesced in HEW's interpretation of the statute." *Id.* at 149. *See also Andrus* v. *Allard*, 444 U.S. 51, 57 (1979) (where Congress had twice reviewed and amended a statute, it was "particularly relevant" that Congress had not rejected the prior administrative interpretation); *Haig* v. *Agee*, 453 U.S. 280, 300-01 (1981).

Thus, defendants' efforts to characterize the 1966 legislative history as "a highly suspect" approach to statutory construction plainly misses the mark. Nor is there a solid basis for defendants' claim that this Court "has generally . . . discredited" any reliance on the defeat of proposed amendments as evidence of legislative intent (Br. for Resp. at 21). In *Bryant* v. *Yellen*, for example, this Court *did* draw "inferences" from Congress' failure to enact certain amendments proposed by the opponents of the statute at

issue. The Court merely commented that "[s]tatements by the opponents of a bill and failure to enact suggested amendments, although they have some weight, are not the most reliable indication of Congressional intention." 447 U.S. at 376.

Defendants' reliance on *United States* v. *Wise* is similarly misplaced (Br. for Resp. at 21). In that case, this Court concluded that, in light of a uniform judicial interpretation of the statute, it was logical to infer that proposed amendments consistent with that interpretation were rejected as superfluous. 370 U.S. 405, 411 (1962). As both opponents and proponents of the proposed 1966 amendment to Title VI recognized, however, the proposed amendment would have drastically altered the administrative interpretation and enforcement of Title VI. Thus the 1966 amendment clearly could not have been regarded as superfluous.

Finally, by contending that the remarks of Representative Celler in 1966 *support* the imposition of an intent standard under Title VI (Br. for Resp. at 23-24), defendants reveal a fundamental misunderstanding both of the meaning of Representative Celler's remarks and of the issue presented for review on this writ of certiorari.

Defendants emphasize that when Representative Celler was asked whether he advocated "a true percentage balance by race", he responded in the negative, and stated that "[e]ach case of discrimination would have to be considered by the *cause*". This brief remark cannot be construed as support for defendants' interpretation of Title VI.* Indeed, a similar argument was made by petitioners in *Board of Education* v. *Harris*, 444 U.S. 130 (1980), and was re-

* As an initial matter, it should be noted that the remarks of Representative Celler quoted by defendants were addressed to Titles I and II of the proposed Civil Rights Act of 1966 (which prohibited discrimination in the selection of federal and state juries), not the proposed amendment to Title VI.

jected by this Court. In that case, reliance was placed upon a colloquoy in the House on the Emergency School Aid Act, in which a proponent of the act stated that ESAA funding would "absolutely not" be conditional on "a perfect racial balance in the faculty in every single school in your district". *Id.* at 147. This Court did not consider the agency regulation at issue in *Harris*, which imposed an impact standard, to be "at all inconsistent with the colloquoy . . . ":

> "HEW, by its regulation, does not require faculties to be in perfect racial balance. It prohibits only faculty assignments that make schools racially identifiable. That is a much narrower requirement." *Id.* at 148.

Thus, Representative Celler's disavowal of a requirement of "true percentage balance by race" in no way implies support for a requirement of proof of purposeful discrimination. In addition, his concern with the "cause" of discrimination is as consistent with a disparate impact test as with an intent test. As this Court has recognized, disparate impact may be justified by proof of business necessity. *Board of Education* v. *Harris*, 444 U.S. at 151; *Griggs* v. *Duke Power Co.*, 401 U.S. at 431. *See also NAACP* v. *The Medical Center, Inc.*, 657 F.2d 1322, 1333-37 (3rd Cir. 1981) (*en banc*); *Bryan* v. *Koch*, 627 F.2d 612, 617-19 (2d Cir. 1980) (disparate impact can be justified under Title VI; proferred justifications found sufficient). Racial disparity is significant because, in the absence of such justification, it is presumed to be caused by the use of criteria that are "artificial, arbitrary, and unnecessary." *Griggs* v. *Duke Power Co.*, 401 U.S. at 431.

Congress has not only refused to disturb the administrative effects regulations for Title VI; it has also acquiesced in agency regulations imposing effects standards under non-

discrimination clauses modeled after Title VI in numerous other federal funding statutes. In a number of cases, these provisions have been either reenacted or amended, and thus have been the object of congressional scrutiny, after this Court's decision in *Washington* v. *Davis;* in no case has Congress amended the provisions to impose an intent test.*

POINT II

The Agency Regulations Are Reasonably Related to the Purposes of Title VI.

Defendants also argue that the uniform and longstanding regulations of numerous federal agencies should be stricken as "clearly" irreconcilable with the statute (Br. for Resp. at 25-26). Defendants provide no authority for this contention.

Indeed, defendants make no mention of *Lau* v. *Nichols,* in which this Court relied on Title VI, on specific regulations and guidelines relating to bilingual instruction, and

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* *See, e.g.,* 20 U.S.C. § 1681(a) (1976) (Title IX of the Education Amendments of 1972), amended by P.L. 94-482, Title IV, § 412 (Oct. 12, 1976), 90 Stat. 2234, and regulations at 45 C.F.R. §§ 86.21, 86.52 (1975); 29 U.S.C. § 794 (1976) (Rehabilitation Act of 1973), amended by P.L. 95-602, Title I, § 120 (Nov. 6, 1978), 92 Stat. 2982, and regulations at 45 C.F.R. §§ 84.4, 84.13 (1977); 31 U.S.C. § 1242(a) (1976) (State and Local Fiscal Assistance Act of 1972), amended by P.L. 94-488, § 8(a) (Oct. 13, 1976), 90 Stat. 2350, and regulations at 31 C.F.R. §§ 51.52, 51.53(b) (1975); 42 U.S.C. § 3766(c)(1) (1976) (Crime Control Act of 1973), reenacted by P.L. 96-157 (Dec. 27, 1979), 93 Stat. 1167, and regulations at 28 C.F.R. § 42.203 (1978); 42 U.S.C. § 5309 (1976) (Housing and Community Development Act of 1974), amended by P.L. 97-35, Title III, § 306 (Aug. 13, 1981), 95 Stat. 392, and regulations at 24 C.F.R. § 570.601 (1980); 42 U.S.C. § 5672(b) (1976) (Juvenile Justice and Delinquency Prevention Act of 1974), as amended by P.L. 95-115, § 6(c) (Oct. 3, 1977), 91 Stat. 1058 and by P.L. 96-509, § 16 (Dec. 8, 1980), 94 Stat. 2761, and regulations at 28 C.F.R. § 42.203 (1977).

on a broad impact regulation identical to those in issue in this case, in holding that proof of intentional discrimination is not required under Title VI. 414 U.S. 563 (1974). Three concurring Justices expressly relied on the regulations and guidelines. *Id.* at 569-71. The concurring Justices concluded that in the absence of affirmative or intentional action on the part of defendants, "it is not entirely clear that § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, standing alone, would render illegal the expenditure of federal funds on these schools." *Id.* at 570. In view of agency regulations imposing an impact standard, the Justices stated that the "critical question" was whether the regulations and guidelines went "beyond the authority of § 601". *Id.* at 571. The concurring Justices concluded that the regulations were " 'reasonably related to the purposes of the enabling legislation' " and, moreover, were " 'entitled to great weight' " as a " 'consistent administrative construction' " of the statute. *Id.*

Thus, this Court has unanimously upheld agency regulations, including the very impact regulation at issue here, as validly promulgated under Title VI. The appropriateness of the Title VI regulation upheld in *Lau* was reaffirmed in *Fullilove* v. *Klutznick*, 448 U.S. 448, 479 (1980).

POINT III

This Court's Decision in *Lau* Is Consistent With Its Decisions in *Bakke* and *Harris*.

Defendants place great reliance on this Court's decisions in *Bakke* and *Harris*, asserting that "comments" in those two cases "effectively repudiate any principles set forth in *Lau* v. *Nichols* . . ." (Br. for Resp. at 11). According to defendants, "[i]n *Bakke*, Justices Powell and Brennan relied upon Congress' refusal to incorporate any 'static' definition

of discrimination into Title VI in concluding that only intentional acts of discrimination were to be actionable under Title VI" (Br. for Resp. at 9). Defendants' description of these opinions is, at best, misleading. Nowhere on the pages cited by defendants do Justices Powell or Brennan conclude that Title VI reaches "only intentional acts of discrimination." Indeed, as discussed in plaintiffs' brief, *Bakke* did not even involve the issue of whether proof of intent is a crucial element of a prima facie case under Title VI (Br. for Pet. at 32-36).

Defendants not only ignore the distinction between "acts that have the effect of discrimination" and "patent preferences designed to remedy past discrimination", *NAACP* v. *The Medical Center, Inc.*, 657 F.2d 1322, 1330 (3rd Cir. 1981) (en banc), but also ignore the emphasis in *Bakke* on the primary importance of agency regulations. Indeed, the opinion of four Justices in *Bakke* and the plurality opinion in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (decided after *Bakke*), specifically cited *Lau* with respect to agency regulations. *See* Br. for Pet. at 34-35.

Defendants' quotation of dicta from *Board of Education* v. *Harris*, 444 U.S. 130 (1979), is similarly unpersuasive. The Court in *Harris* expressly declined to consider the question of whether Title VI requires a showing of intentional discrimination, *id.* at 149, inasmuch as that statute was not involved in the case. The statutory question presented therein was whether proof of intentional discrimination was necessary in order to disqualify a funding applicant under the Emergency School Aid Act of 1972. Moreover, the Court's reference to Title VI in that opinion simply noted that termination of all federal funding, a possible consequence of a violation of Title VI, is a more drastic remedy than the cutoff of ESAA funds pursuant to the ESAA. The case now before this Court does not involve the termination of any funds.

Amicus Equal Employment Advisory Council (EEAC) finds additional support in *Fullilove* for the view that in *Bakke* this Court overruled *Lau* (Br. of EEAC at 14). Such reliance is certainly misplaced. The Court in *Fullilove* upheld an intentional Congressional racial classification, the minority business enterprise (MBE) program, against a challenge under the Constitution and, *inter alia*, Title VI. As in *Bakke*, the issue of nonintentional discrimination was not involved. As amicus EEAC notes, Justices Powell and Marshall found the Government's justification for the classification sufficient under the Constitution, and required no greater justification under Title VI. *Fullilove* v. *Klutznick*, 448 U.S. at 517 n.15 (Powell, J., concurring); *id.* at 517 n.1 (Marshall, J., concurring). Those opinions thus confirm the approach taken in *Bakke*, but do not support the very different conclusion that Title VI prohibits only intentional discrimination.

Moreover, as plaintiffs point out in their main brief, the opinion of Chief Justice Burger in *Fullilove* cited with approval the decision in *Lau* (Br. for Pet. at 30, 35). Indeed, the Chief Justice concluded that in enacting the MBE program, Congress had sought to remedy non-intentional discrimination—the use of practices which had "*the effect* of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriation." 448 U.S. at 480 (emphasis added). The Chief Justice drew upon *Lau* as an "instructive" example of the use of the Spending Power to achieve such an objective. *Id.* at 479.

In sum, the more recent decisions of this Court, in cases which presented for review issues materially different from the issue presented here, not only fail to "repudiate" the principles set forth in *Lau*, but are consistent with those principles.

CONCLUSION

For the reasons stated above and in plaintiffs' main brief, this Court should reverse the decision below with respect to Title VI and remand for the fashioning of appropriate relief.

Dated: New York, New York
October 21, 1982

Respectfully submitted,

CHRISTOPHER CROWLEY
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

Of Counsel:

JUNE ROSE
JOAN GUGGENHEIMER
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

KENNETH KIMERLING
CESAR A. PERALES
Puerto Rican Legal Defense and Education Fund, Inc.
95 Madison Avenue
New York, New York 10016
Tel.: (212) 532-8470

Amicus Brief

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No. 81-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,

Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NAACP, *AMICUS CURIAE*

THOMAS I. ATKINS
General Counsel
MICHAEL H. SUSSMAN
Assistant General Counsel
NAACP SPECIAL CONTRIBUTION FUND
1790 Broadway, 10th Fl.
New York, N.Y. 10019
212-245-2100

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—against—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NAACP, *AMICUS CURIAE*

Interest of the *Amicus*

The NAACP, the nation's largest and oldest civil rights organization, directly represents the interest of several hundred thousand black-American members. The Association was formed to advocate the political, social, legal and economic rights of black-Americans.

Discrimination in employment and other contractual relationships has detrimentally affected the lives of millions of black Americans and many of our members. The NAACP

has substantial interest in the application of Title VI and 42 U.S.C. §1981 to afford equal protection against all forms of employment discrimination.

The NAACP is particularly concerned about the possible imposition of the onerous burden of proving intentional discrimination upon plaintiffs alleging illegal unemployment discrimination under a Title VI and 42 U.S.C. §1981. Imposing such a burden of proof would make it impossible to eradicate covert, structural racial discrimination. Because of the great strides this country has made in legislating and enforcing civil rights laws and the current impropriety of openly racist views, overt discrimination is largely a thing of the past. But because of our history of racial discrimination, traces of racial prejudice continue to contaminate this nation. Today there are few who will openly tell a black job applicant that he or she will not be hired because of race. But there remain huge disparities in black and white unemployment rates. We believe that these disparities are due, in large part, to our nation's history of racial discrimination and current covert discrimination.

We believe that reversal by this Court is necessary to vindicate and forward the purposes of the nation's policy and protections against employment discrimination.

Consent of the Parties

Counsel for all parties have been contacted by counsel for *amici* and have indicated their consent to the filing of this Brief. Written consents have been filed with the clerk to this effect.

Statement of Interest

The National Association for the Advancement of Colored People is the largest and oldest civil rights organization in the United States, representing the interests of several hundred of thousands of members. This case raises the critical question of whether plaintiffs who have proven that non-job related entry level employment examinations had a discriminatory effect on racial minority applicants must also prove subjective discriminatory intent as a prerequisite to relief under 42 U.S.C. § 1981 and Title VI of The Civil Rights Act of 1964, 42 U.S.C. 2000e. Black-Americans, represented as they have been on many occasions by the NAACP, have a deep and abiding interest in this question as its resolution will foreseeably affect the possibility of strong enforcement of important anti-discrimination laws.

Statement of the Case

We adopt the statement of the case presented by petitioner, The Guardians Association, et al.

ARGUMENT

I.

Section 1981 Allows for Proof of Discrimination by Persuasive Evidence of Racially Disparate Effects.

A. The Standard of Proof Required to Prove Liability Under 42 U.S.C. §1981 Was Not Resolved by *Washington* v. *Davis*.

Before this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), the lower federal courts had almost unanimously held that proof of intentional discrimination was not required to establish a violation of 42 U.S.C. §1981 (1976). *See Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Kirkland* v. *N.Y. State Dept. of Correctional Services*, 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), *reh. denied*, 429 U.S. 1124 (1977); *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187, 1200 (D. Md.), *modified sub nom. Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 729 (5th Cir.), *reh. denied*, 542 F.2d 1173 (5th Cir. 1976); *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1320-21 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Chicano Police Officers' Ass'n* v. *Stover*, 526 F.2d 431, 438 (10th Cir. 1975), *vacated and remanded*, 426 U.S. 944 (1976).

In *Washington* v. *Davis*, this Court held that proof of intentional discrimination was necessary to establish a violation of the Equal Protection Clause of the Fourteenth Amendment. 426 U.S. at 239. This Court did not decide whether proof of intentional discrimination was also re-

quired under §1981. While this Court did order that summary judgment be entered for defendants not only on the constitutional claims but on the statutory claims, including a §1981 claim as well, *Id.* at 248, contrary to the City's suggestion (op. cert. at 17), *Davis* did not discuss the standard of proof requisite for liability under §1981.[1] Thus, this Court did not rule on the burden of proof necessary for raising a claim under §1981 but instead dismissed the case on its merits because the defendant had met its burden of justification. *See Gay* v. *Waiters & Dairy Lunchmen's Union, Local No. 30,* 489 F. Supp. 282, 297 (N.D. Cal. 1980); *Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979). *See also* Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?,* 80 COLUM. U.L. REV. 137, 147 n.80 (1980) [hereinafter cited as Note, *Section 1981*].

Indeed, subsequent to *Washington* v. *Davis,* this Court granted a writ of certiorari "to consider questions presented as to whether the use of arbitrary employment criteria, racially exclusionary in operation, but not purposefully discriminatory, violates 42 U.S.C. §1981." *County of Los Angeles* v. *Davis,* 440 U.S. 625, 627 (1979) (vacating and remanding as moot).

In dissenting from the opinion of the Court vacating the judgment below, Justice Powell specifically noted that this important question had been "heretofore unresolved by this Court." *Id.* at 637. Thus, it is clear that this Court did not rule on the standards of proof required for liability under §1981 in *Washington* v. *Davis.*[2] See *Guardians Ass'n*

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[1] In *Davis,* this Court found the police department's test job-related and, on that basis, caused the dismissal of plaintiffs' statutory claim. *Id.* at 250.

[2] This Court has never before reached the standard of proof required for liability under §1981. The Second Circuit, *Guardians*

of N.Y.C. v. *Civil Service Com'n*, 633 F.2d 232, 264 (2d Cir. 1980).

Following *Washington* v. *Davis*, one Court of Appeals held that proof of intentional discrimination was not required for liability under §1981. *Davis* v. *County of Los Angeles*, 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979). *See also*: *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838 and n.22 (D.C. Cir. 1977) *(dictum)*; *Commonwealth of Pa.* v. *Local U. 542, Intern. U.*, 469 F. Supp. 329, 401 (E.D. Pa. 1978). Two other circuits have reserved decision on this question. *Richardson* v. *Pa. Dept. of Health*, 561 F.2d 489, 493 (3d Cir. 1977); *United Black Firefighters of Norfolk* v. *Hirst*, 604 F.2d 844, 848 (4th Cir. 1979). But the vast majority of the federal courts faced with this issue have imposed upon plaintiffs the onerous burden of establishing intentional discrimination. *Guardians Ass'n of N.Y.C.* v. *Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980); *Bronze*

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633 F.2d at 267 n.65, and the City of New York have erroneously suggested that *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) foreclosed this issue by stating that section 1 of the Civil Rights of 1866 "was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute. . ." *Id.* at 426. *See Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 964-65 (D. Md. 1977). However, this language was dictum on the question of intent since *Jones* unquestionably involved intentional discrimination. Furthermore, this dictum is taken out of context. The full sentence states:

> Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that §1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" were to be criminally punishable under §2. 392 U.S. at 426.

The Court's emphasis of the word "all" shows that its stress was on §1981's application to all discriminatory acts, both private and public. Note, *Section 1981, supra* at 139 n. 14. A careful reading of this sentence demonstrates that this Court did not intend to incorporate an intent standard in this *dictum*.

Shields, Inc. v. *N.J. Dept. of Civil Services*, 488 F. Supp. 723, 729 (D. N.J. 1980); *Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 963 (D. Md. 1977); *Williams* v. *DeKalb, per curiam*, 582 F.2d 2 (5th Cir. 1978); *Arnold* v. *Ballard*, 448 F. Supp. 1025, 1027-28 (N.D. Ohio 1978); *Mescall* v. *Burrus*, 603 F.2d 1266, 1271 (7th Cir. 1979); *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978); *Craig* v. *County of Los Angeles*, 626 F.2d 659, 668 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *Chicano Police Officers' Ass'n* v. *Stover, per curiam*, 552 F.2d 918, 920 (10th Cir. 1977).

Most courts have imposed the requirement of proof of intentional discrimination in §1981 actions with only a superficial analysis. *See, e.g., Croker* v. *Boeing Co., (Vertol Division)*, 437 F. Supp. 1138, 1181 (E.D. Pa. 1977); *Williams* v. *DeKalb County, per curiam*, 582 F.2d 2 (5th Cir. 1978); *Mescall* v. *Burrus*, 603, F.2d 1266 (7th Cir. 1979); *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978); *Chicano Police Officers' Ass'n* v. *Stover, per curiam*, 552 F.2d 918 (10th Cir. 1977). *See also Note, Section 1981*, at 138-39. Some courts have merely treated §1981 as commensurate with the Equal Protection Clause and, consequently, deemed it directly governed by *Washington* v. *Davis*. *See, e.g., Williams* v. *DeKalb County*, 582 F.2d at 2-3; *Mescall* v. *Burrus*, 603 F.2d at 1271; *Johnson* v. *Alexander*, 572 F.2d at 1223. *Contra Lewis* v. *Bethlehem Steel*, 440 F. Supp. 949, 963 (D. Md. 1977) (imposing intent requirement); *Commonwealth of Pa.* v. *Local Union 542, Intern. U.*, 469 F. Supp. 329, 401 (E.D. Pa. 1978) (rejecting intent requirement).

Section 1981 is not equivalent to the Fourteenth Amendment. This Court has consistently recognized that the Civil Rights Act of 1866, of which §1981 was a part, was premised on the Thirteenth rather than on the Fourteenth

Amendment. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). This view is supported by the historical evidence. The Civil Rights Act of 1866 was originally enacted pursuant to the Thirteenth Amendment. It was subsequently re-enacted in 1870 after the adoption of the Fourteenth Amendment—not to make the Fourteenth Amendment the sole basis of the statute, but to ensure that its provisions would not be found unconstitutional. *See Commonwealth of Pa.* v. *Local 542, Intern. U.*, 469 F. Supp. 329, 400-01 (E.D. Pa. 1978).

In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court relied on the derivation of § 1981 from the Thirteenth Amendment to hold that § 1981 prohibits racial discrimination in making and enforcing private contracts. *Id.* at 168. Having held that § 1981 stems from the Thirteenth Amendment in determining whether state action is required for liability, *Note Section 1981, supra* at 150, it would be flagrantly inconsistent now to find that § 1981 is based on the Fourteenth Amendment in determining the standard of proof requisite for liability under § 1981.

Admitting that § 1981 was enacted pursuant to the Thirteenth Amendment, other lower federal courts have attempted to brush over this inconsistency by asserting that its relationship with the Fourteenth Amendment is close enough that the standard of liability prescribed by *Washington* v. *Davis* should apply; *Mescall* v. *Burrus*, 603 F.2d 1266, 1271 (7th Cir. 1979); *Craig* v. *County of Los Angeles*, 626 F.2d 659, 668 (9th Cir. 1980), *cert. denied*, 450 U.S.

919 (1981); *Gay* v. *Waiters & Dairy Lunchmen's Union, Local No. 30*, 489 F. Supp. 282, 298 (N.D. Cal. 1980). But this proposition does not diminish the glaring disparity in the treatment of the relationship between § 1981 and the Fourteenth Amendment in *Runyon* and in the line of cases dealing with the standard of proof requisite to liability. The state action requirement is the most fundamental limitation upon the Fourteenth Amendment and the ability of Congress to enforce it. Thus, if § 1981 is not so historically connected to the Fourteenth Amendment that it must be limited to cases involving state action, then it is inconceivable that this close connection *requires* the imposition of a prerequisite of intentional discrimination to establish liability under it. Consequently, the standard of proof for § 1981 actions is not governed by *Washington* v. *Davis*.

B. The Thirteenth Amendment Does Not Require Intentional Discrimination to Establish Proof of a Violation.

Since § 1981 was almost exclusively based on the Thirteenth Amendment, its standard of proof provides a useful referent. In the peonage cases, this Court consistently ruled that discriminatory intent need not be proven in order to establish a violation of the Thirteenth Amendment. In *Bailey* v. *Alabama*, 219 U.S. 219 (1911), Chief Justice Hughes, speaking for this Court, said, "What the State may not do directly it may not do indirectly. . . . *Without imputing any actual motive to oppress*, we must consider the natural operation of the statute here in question, and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid. . ." *Id.* at 244-45 (emphasis added). The Court did not require that plaintiffs prove discriminatory intent on the part of the officials, but instead examined the effect of the law to determine its validity under the Thirteenth

Amendment. See also *Taylor* v. *Georgia*, 315 U.S. 25, 29 (1942); *Pollock* v. *Williams*, 322 U.S. 425 (1944). Although these cases were decided under the 1867 Antipeonage Act as well as the Thirteenth Amendment, this Court did not find any constitutional requirement of intent. Furthermore, to the extent that the cases were decided on the basis of the Antipeonage Act, the peonage cases stand for the proposition that Congress can use its enforcement power to impose an effect requirement.

Finally, there is no reason why the same standard of proof should apply to both the Thirteenth and Fourteenth Amendments. The reasons for applying the standard of intentional discrimination under the Fourteenth Amendment do not apply to the Thirteenth Amendment. The Thirteenth Amendment has a much narrower substantive scope since it is limited to slavery and involuntary servitude. This fact reduces the potential for intrusive judicial policymaking. *Note, Section 1981* at 152. In addition, the Thirteenth Amendment is "directed toward ensuring civil equality of all races in the most fundamental aspects of social relations," while the Equal Protection Clause is directed at ensuring governmental neutrality. *Id.* Consequently, there is greater justification for a disparate impact standard under the Thirteenth Amendment. Furthermore, under section 2 of the Thirteenth Amendment, Congress has the power "to pass all laws necessary and proper for abolishing all badges and incidents of slavery." *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968). Therefore, Congress was able to provide for the establishment of a § 1981 claim upon proof of discriminatory impact or effect alone. *Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 964 (D. Md. 1977).

C. The Appropriate Standard of Proof Under §1981 Is Disproportionate Impact.

1. *The Language of Section 1981 Requires the Conclusion That There Is No Requirement of Proof of Intentional Discrimination.*

Section 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This language makes clear a Congressional intent to deal with extant discrimination, whether purposeful or not. The unequivocal and unconditional language of the statute provides no support for the imposition of an intent standard. *Contra, Guardians,* 633 F.2d 266. Rather, the section is an explicit affirmation of the rights of those persons it protects.

Indeed, this language is in marked contrast to the more detailed and exacting language of Title VII, 42 U.S.C. 2000e-2(h) (1976):

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Despite the use of words such as "designed, intended or used to discriminate," in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that the standard of proof required under Title VII could be met by a showing of disparate impact, as opposed to intentional racial discrimination.

2. *The Legislative History of §1981 Suggests That Congress Did Not Intend to Require Proof of Intentional Discrimination to Establish a Violation.*

The legislative history of § 1981 demonstrates that the 39th Congress intended to provide practical freedom for the freed slaves by outlawing all forms of discrimination against blacks in the making and enforcement of contracts. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426-44 (1968). Members of the 39th Congress stressed repeatedly that the legislation was meant to make freedman status meaningful in fact. *See* Note, *Section 1981*, *supra* at 162. Senator Trumbull, chairman of the Senate Judiciary Committee and author of the bill which became the Civil Rights Act of 1866, introduced his bill less than one month after the ratification of the Thirteenth Amendment. He explained the need for the bill, observing that the Thirteenth Amendment "declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom." *Cong. Globe*, 39th Cong., 1st Sess. at 474 (1866).

Representative Thayer of Pennsylvania, a strong supporter of the bill, said:

> The bill under consideration is intended only to carry into practical effect the amendment of the Constitution. Its object is to declare not only that slavery be abolished upon the pages of your Constitution, but

> that it shall be abolished in fact and in deed . . . all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty shall be abolished and destroyed forever. *Id.* at 1152.

The architects of the Civil Rights Act of 1866 enacted this legislation to achieve the practical result of providing freedom to the freedmen

It has been argued that since Congress enacted § 1981 to rectify those forms of discrimination prevalent in 1866, which were predominantly intentional, § 1981 today must be restricted to such discrimination. This argument, however, diverges from the broad scope of the statutory language and the statements of its framers. Although the 39th Congress was primarily concerned with the Black Codes which had recently been adopted by the Southern states, the language of the Civil Rights Act, as this Court has noted, "was far broader than would have been necessary to strike down discriminatory statutes." *Jones* v. *Alfred H. Mayer*, 392 U.S. 409, 426-27 (1968). *See Comment, Developments in the Law—Section 1981*, 15 *Harv. C.R.C.L. Rev.* 29, 177 (1980) [hereinafter cited as *Developments*].

Despite the prevalence of intentional discrimination in 1866, it cannot be shown that Congress intended to impose on plaintiffs the onerous burden of proving intentional discrimination. Although the Second Circuit was "unable to find anything in the legislative history to indicate that the Thirty-Ninth Congress . . . or the later Congresses . . . understood the law to prohibit anything other than the racially motivated refusal to treat whites and non-whites in the same, neutral manner," *Guardians*, 633 F.2d 267, the evidence shows that the 39th Congress was not only interested in protections against overt discrimination; it re-

peatedly denounced the vagrancy laws. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. at 1123-24 (Remark of Representative Look).

With the exception of Mississippi, none of the Southern states enacted Black Codes containing explicitly discriminatory vagrancy provisions. Instead, these provisions defined "vagrant" to include any man not gainfully employed, and provided, as punishment, service for a master for a period of up to one year. Such a definition operated to include almost every black in the post-bellum South.

Although it seems clear that these facially neutral vagrancy statutes were enacted with discriminatory intent, it is inconceivable that Congress intended to impose a requirement of a judicial determination of intent prior to invalidating them. The legislators who enacted § 1981 thought it would "wipe out all those (vagrancy) laws." *Cong. Globe*, 39th Cong., 1st Sess., 605, 1759 (1866) (Remarks of Senator Trumbull, author of the Act). The legislators' fervent approval of the military governor's actions in enjoining the execution of the vagrancy laws, see *Cong. Globe*, 39th Cong., 1st Sess. 1123 (1866), indicates their desire through § 1981 to end state actions which resulted in discrimination, without first analyzing intent. Congress wanted to hasten the time when these free men would be protected without the assistance of the occupying military forces, *Id.* at 1124, by establishing firm civilian protection against actions which effectively denied the benefits of civic life to blacks.[3]

Furthermore, Congress did not specifically address the question of imposing an intent requirement in § 1981. When

[3] Furthermore, under then applicable decisions of this Court, it would have been impermissible to inquire into the motives of a legislature. *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130 (1810). *See Note, Section 1981, supra* at 158.

this question was raised with regard to section 2 of the Civil Rights Act of 1866, its proponents responded that a requirement of unlawful intent could be inferred from the fact that § 2 was a penal provision. Such reasoning is inapplicable to section 1, a civil provision, which suggests that Congress did not intend to require proof of intentional racial discrimination. See *Note, Section 1981, supra* at 159. The disproportionate impact standard would further the congressional intent behind § 1981 because it is responsive to achieving equally in fact. *Id.* at 163.

3. *Different Standards of Proof are Permissible for Constitutional Provisions and the Statutes Adopted to Enforce These Provisions.*

Even if the Thirteenth Amendment were to require proof of racially discriminatory intent, section 1981 need not be so restricted. See *Dawson* v. *Pastrick*, 441 F. Supp. 133, 140 (N.D. Ind. 1977), *aff'd in part, rev'd in part*, 600 F.2d 70 (7th Cir. 1979). First, § 1981 is not by its nature a statute which must correspond to the standard of proof required by the constitutional provision pursuant to which it was enacted. Statutes which themselves create no substantive rights but simply furnish a federal cause of action for deprivations of constitutional rights may be used to present only "constitutional" claims and, consequently, must be held to the standard of proof required by the constitutional provision pursuant to which it was enacted. Note, *Section 1981, supra*, at 153. But, as this Court has repeatedly recognized, § 1981 created substantive rights, independent of the Thirteenth Amendment. *See Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 617 & n. 33 (1979); *Great Am. Federal S & L Ass'n* v. *Novotny*, 442 U.S. 366, 377 (1979). Therefore, § 1981 need not parallel the standard for the Thirteenth Amendment.

Second, under section 2 of the Thirteenth Amendment, Congress has very broad enforcement powers, which include the right to adopt a different standard of proof than that required under section 1. *Note, Section 1981, supra* at 154. Under section 2, Congress may legislate substantive protections broader than those set out in the Constitution itself. Therefore, that same enforcement power must also provide a basis to legislate a less stringent standard of proof. *Note, Section 1981, supra* at 155. This enforcement power is analogous to that which this Court has recognized under section 5 of the Fourteenth Amendment. *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *cf. Oregon* v. *Mitchell,* 400 U.S. 112 (1970). Furthermore, in *City of Rome* v. *United States,* 446 U.S. 156 (1980), *reh. denied,* 447 U.S. 916 (1980), this Court upheld the bail-out provisions of the Voting Rights Act. Justice Marshall, speaking for the Court, said, "We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect." *Id.* at 173. See also *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966). Thus, Congress has the power to impose a disparate impact standard under section 2 of the Thirteenth Amendment. This would also apply even if § 1981 were considered to be partially based on the Fourteenth Amendment.

Indeed, in *Washington* v. *Davis,* this Court invited legislation, by its suggestion that extension of the disparate impact rule "beyond those areas where it is already applicable by reason of the statute, such as in the field of public employment, should await legislative prescription." 426 U.S. at 248. *See* Note, *Section 1981, supra* at 150 n. 94.

Finally, the Second Circuit suggests that an effects standard in a "contracts" case would compel the same standard

for all rights protected by section 1981. And, how, the Circuit asks, does this make sense with respect to the right to sue or the right to give evidence. *Guardians,* 633 F.2d at 266. In response, it is evident that state policies which disproportionately burden blacks or other insular minorities in the exercise of these rights may be enacted without clear racial intent or animus. For example, a legislature might require a 9th grade education before allowing a person to initiate suit. While not intentionally discriminatory, such enactment would be actionable under section 1981 using an "effect" standard. The court would accept evidence that this requirement disproportionately excluded blacks from using the judicial forum and, finding a *prima facie* case of racial impact, would require the State to justify this requirement by reference to compelling state interests. Such a hypothetical clearly meets the Circuit's comments that "plaintiffs have not suggested to us, nor is it immediately apparent, how the concept of disproportionate impact would give to the notion of equality in regard to such rights as the right to sue . . ." *Id.*

Nor is the Circuit on firm ground in stating that the numerosity of contracts in our society militates against an effect standard. *Id.* at 266-267. First, there are no profound evidentiary problems raised by such a standard, as the Court seems to assume. Second, showing disproportionate impact does not irrebuttably lead to a declaration of illegality, but rather shifts the burden of persuasion to the defendant who then must demonstrate that the challenged and disproportionately effecting practice is either job-related, business-related or supported by compelling state interests. No irrebuttable presumption applies in such instances and if defendants can show that they have used the least intrusive or discriminatory practice, they will prevail. Consequently, adopting the disproportionate

impact standard will not lead to the wholesale striking of public practices which are carefully tailored to important state interests.

4. *Anti-Discrimination Policy Supports a Disproportionate Impact Standard for Liability Under §1981.*

Imposition of the onerous burden of providing intentional discrimination upon plaintiffs in § 1981 cases would thwart the congressional aim of providing practical freedom in fact. Moreover, there is little merit in the arguments advanced for imposing such a standard and no evidence that a disproportionate impact standard would invite frivolous claims. There is no evidence that it is more difficult to dispose of claims based on disproportionate impact at an early stage of litigation than those involving discriminatory intent, especially since intent may be inferred from evidence of substantially disparate impact. *Washington* v. *Davis,* 426 U.S. at 242. *Columbus Board of Education* v. *Penick,* 443 U.S. (1979).

Additionally, the claim made by the Second Circuit in *Guardians* at 268, that allowing different standard for claims under §1981 and the Fourteenth Amendment circumvents the *Washington* v. *Davis* ruling since both claims may be made simultaneously, ignores the independence of the claims. *Developments, supra* at 183. §1981 is a very narrowly drawn statute which applies only to racial discrimination in the making and enforcement of contracts. Furthermore, the claim that a disparate impact standard under §1981 would encourage avoidance of the administrative procedures and remedies of Title VII ignores the fact that this is just as true of claims of intentional discrimination. In *Johnson* v. *Railway Express,* 421 U.S. 454 (1975), this Court recognized that, "the remedies available under Title VII and under §1981, although related, and although di-

rected to most of the same ends, are separate, distinct and independent." *Id.* at 461.

There is nothing in the history of the disparate impact standard as applied under §1981 which sustains fears of mass invalidation of legislation and interference with private activities, as both the Second Circuit and the City emphasize. *Guardians,* 633 F.2d at 268 (*op. cert.* at 22). Moreover, such fears are much less important in construing a statute than in construing a constitutional provision since the former is more amenable to modification by Congress should it find undue interference with government programs. *Developments, supra* at 184.

The impact standard provides the only means, in many cases, of proving classwide contractual discrimination against racial minorities where the discrimination occurs in a subtle and covert manner. *Developments, supra* at 185. A requirement of proof of discriminatory intent would thwart the statute's purpose by imposing an onerous evidentiary burden on plaintiffs, *Note Section 1981, supra* at 162, and would needlessly permit the perpetrators of subtle and sophisticated discrimination to enjoy perpetually immunized judicially enforced benefits. Surely, the Thirteenth Amendment cannot be read to proscribe only clumsy and simple-minded discrimination.

II.

Title VI Prohibits Actions by Recipients of Federal Funds Which Effectively Discriminate Against Minorities.

The panel below divided on whether Title VI creates a private right of action. However, in a concurring opinion, Judge Coffrin held for the majority that Title VI violations could be proven only by evidence sufficient to meet the standard of intentional discrimination set by *Washington* v. *Davis*, 426 U.S. 229 (1976). *Guardians Ass'n of NYC* v. *Civil Service Comm'n*, 633 F.2d 232, 272 (2d Cir. 1984). The issue before this Court is whether Congress intended Title VI of the Civil Rights Act of 1964 to proscribe only intentionally discriminatory conduct or whether Congress left the definition of discrimination open, to be determined and applied variously by responsible federal agencies charged in section 602 with promulgating implementing regulations.

A. The Language of Title VI as Well as the Most Reasonable Construction of the Civil Rights Act of 1964 Supports the Validity of an Impact Standard in Employment Discrimination Cases.

Section 601 of Title VI, 42 U.S.C. 2000d, reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

There are two noteworthy features of this language: (a) Congress was clearly concerned with the actual effects of the administration of federally-supported programs. The

disjunctive "or" separates three important and distinguishable concepts: exclusion from; denial of; and discrimination under. Congress sought to reach and eliminate all three phenomena. Judge Coffrin recognized this objective of Title VI below when he wrote:

> "Section 601 of the Civil Rights Act is not cast in the prohibitory language of a penal statute. It does not forbid discrimination by recipients of federal funds, it provides simply that persons shall not be excluded from the benefit of those funds because of race, color or national origin. Its language is not directed to a violator's conduct, it is directed to the victims' rights." *Id.* at 273.

(b) The clear language does not suggest a conclusion that Congress intended to require proof by plaintiffs of discriminatory intent. On the contrary, as has often been noted, through Section 602 of Title VI, Congress vested each federal agency which distributes federal funds with substantial discretion for developing regulations which would effect the broad and clear statutory purpose—to assure equal *treatment* of all Americans. (110 Cong. Rec. 1520 (1964) (remarks of Rep. Celler, floor manager of the bill in the House of Representatives). This delegation to federal agencies, both theoretically and as it has been executed, suggests a Congressional preference for flexibility, rather than insistence upon an "intent" standard in litigation brought under Title VI. ". . . [T]here was a strong emphasis throughout Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another so

that the term would assume different meanings in different contexts." *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 338-339 (1978), quoting from Testimony of Attorney General Kennedy at hearings before Senate Committee on the Judiciary on S. 1737 and S. 1750, 88th Cong., 1st Sess., 398-399 (1963).[4] It is consistent with this delegation for courts to give great weight to administrative regulations. *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974) (Stewart, J. concurring).

It is also clear that the language of Title VI does *not* compel application of the *constitutional* standard of proof to all Title VI cases. Comparison with the language of other Titles of the Civil Rights Act of 1964 indicates that Congress knew how to require a "mirror image" of the constitutional standard of proof. Instead of using such language in Title VI, as it did in Title IV, Congress fashioned this provision to be as broad in scope as Titles II, VII and VIII, each of which may be met by proof of disparate impact.

Title IV authorizes the Attorney General to bring suit against local school districts whenever, *inter alia*, he has received a complaint in writing from parents to the effect that their minor children "are being deprived by a school board of the equal protections of the laws. . . ." 42 U.S.C.

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[4] Section 602 supports the proposition that Congress intended each agency to determine how best the Title's resolve could be met with respect to its individual programs. One aspect of this determination was defining the appropriate standard of proof to require before finding a recipient of federal funds in violation of Title VI. "Each federal department and agency which is empowered to extend federal financial assistance . . . is authorized and directed to effectuate the provisions of section 2000d of this Title with respect to such program or activity by issuing rules, regulations or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with the action is taken." 42 U.S.C. § 2000d-1 (1976). Critically, with only one exception, all Federal agencies have adopted an effect standard.

2000c-6(a) (1976). In adopting this Title, Congress left no doubt that the constitutional standard of proving discrimination was to be applied in school desegregation cases. 110 Cong. Rec. 12,715 (1964).[5] Title VI does not incorporate such a standard on its face and, from this, it is reasonable to imply that Congress did not intend to apply the "equal protection" standard for proving of discrimination. *See,* J. Benjes, J. Heubert and M. O'Brien, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964,* pp. 537-622, at 544, is *Harvard Civil Rights Civil Liberties Law Review,* 537, 544 (Winter 1980). Moreover, the Congressional delegation of regulatory discretion under Title VI to each federal agency charged with distributing federal funds militates against the conclusion that Congress intended only one standard—the constitutional one—to apply in all cases. Rather, as seems apparent from the presence of section 602 and its legislative history, Congress assumed that different federal programs might demand different standards for determining or defining discrimination.

It is beyond peradventure or dispute that Congress did not require proof of intentional discrimination—whatever the prevailing constitutional standard—in cases arising under Titles II, VII and VIII.[6] For instance, in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) Chief Justice Burger, after reviewing the language of Title VII and the legislative history held:

> The objective of Congress . . . is plain from the language of the statute. It was to achieve equality of

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[5] Of course, in 1964, proof of discriminatory intent was not required in equal protection cases.

[6] Title VIII, the Fair Housing Act, 42 U.S.C. 3601 *et seq.,* (1976), was enacted in 1968. For judicial interpretation, *see Robinson* v. *12 Loft Realty, Inc.,* 610 F.2d 1032, 1036-37 (2nd Cir. 1979).

> employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face and even *neutral in terms of intent*, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices. (emphasis added).

Title VI appears equally open to this interpretation. Title VII proscribes the deprivation of employment opportunities "because . . . of race." 42 U.S.C. § 2000e-2(a)(1) & (2) (1976). Title VI, which also concerns employment opportunities, protects persons from exclusion, denial or discrimination "on the grounds of race." If the "because of" language in Title VII can sustain judgment for plaintiffs based on proof of discriminatory impact, there is no logical or linguistic argument against a similar construction of Title VI.[7]

B. Prior Judicial Decisions Support the Disparate Impact Standard in This Context.

In *Lau* v. *Nichols, supra,* this Court squarely held that proof of racially disparate impact satisfied plaintiffs' burden under Title VI. This Court then noted the statute's broad remedial purposes, *id.* at 569, and a statutory scheme which gave considerable discretion to knowl-

[7] The legislative history of Title VI supports this conclusion. As Senate sponsor Humphrey stated, "Where Federal funds are made available to provide jobs, it would be unconscionable to allow racial discrimination in the availablity of these jobs. Title VI would thus authorize adoption of regulations requiring the elimination of racial discrimination in referral practices, treatment of job applicants, et cetera, by such State employment services receiving federal funds." 110 Cong. Rec. p. 6545. By imposing an affirmative obligation on recipients to insure the availability of jobs to minorities, this passage strongly supports the view that Title VI was not to be interpreted less stringently than Title VII.

edgeable and responsible federal agencies in implementing the statute. In *Lau*, this Court held that 45 C.F.R. § 80.3 (b)(2) which utilized an effects standard to judge compliance was consistent with Title VI.

Notwithstanding *Lau*, since 1978, following what they have construed to be the position of a majority of this Court in *Regents of the University of California* v. *Bakke*, *supra*, five Circuit courts have held that proof of discriminatory purpose is required by Title VI. Despite acknowledging the anomaly created in the employment discrimination context by applying one standard of proof to employers in their use of federal funds (intent) and another more generally (effect), the panel below likewise required proof of intentional discrimination under Title VI.

In our judgment, extrapolation from the reasoning of *Bakke*, as opposed to *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), to determine the vitality of *Lau* is legally uncompelling and, if accepted, will vitiate the central purposes of Title VI, especially in the employment discrimination area. Moreover, requiring proof of intent will frustrate federal enforcement, already a difficult endeavor with the great diversity and number of recipients. Finally, the fears which underlie arguments that an effect standard will create excessive Federal enforcement authority are unconvincing.

1. Bakke *Did Not Raise the Issue Now Before the Court in a Context Similiar to* Guardians *and Its Logic Does Not Compel an Intent Standard in* Guardians.

Bakke was a challenge to a voluntary affirmative action program, implemented to advantage prospective minority medical students. Two issues of importance faced this court in *Bakke:* (1) whether the equal protection clause of the Fourteenth Amendment prohibited the set-aside of

a specific number of medical school slots for minorities and (2) whether, if the Constitution allowed this or another weaker form of preference for minority students, Congress prohibited such practices through Title VI? Accordingly, the issue before this Court regarding Title VI was whether it prohibited conduct intended to be favorable to minorities and permitted by the Constitution.[8]

A majority of this Court, including Justice Brennan, in a separate opinion joined by Justices White, Blackmun and Marshall, found that, in enacting Title VI, Congress did not intend to prohibit conduct permissible under the Constitution, namely a university's taking minority status favorably into account in making admissions decisions. In reaching this judgment, Justice Brennan concluded that in matters such as these, Congress intended Title VI to be interpreted co-extensively with the Constitution. *Id.* at 345. From this conclusion, several circuit courts have concluded that for purposes of proving a Title VI claim, black plaintiffs challenging as discriminatory state practice, as in *Guardian* , must meet the constitutional standard of proof. But, this conclusion does *not* follow from *Bakke.* As one commentator has explained:

> To conclude in *Bakke* that Title VI had *greater* prospective reach than the equal protection clause would have constituted a severe setback for this country's racial minorities. It would have made inevitable the position that, while the equal protection clause may tolerate some benign racial preferences to combat a

[8] As a matter of constitutional logic, if the Fourteenth Amendment prohibited the practice challenged in *Bakke*, there would have been no need to reach the statutory issue. On the other hand, if, as the majority of this court found, the Constitution allowed some forms of color consciousness to influence medical school admissions, the issue was whether Congress, through statutory enactment, had specifically prohibited this form of preference.

> centuries-long history of discrimination, such preferences are flatly barred by Title VI. Solicitude for racial minorities exerted a powerful pressure in *Bakke* to find Title VI no broader than the equal protection clause. . . .
>
> In the *Lau* context, however, the policy considerations exert pressure in the opposite direction. Concern for racial minorities in such a context would favor the view that Title VI *does* have greater proscriptive reach than the equal protection clause so the discriminatory effects that cannot constitute an equal protection violation may be properly proscribed under Title VI. Thus, *Bakke* dicta as to congruity between Title VI and the equal protection clause, insofar as purposeful discrimination is concerned, should not be read as applicable to *Lau's* discriminatory effects question, since the *Bakke* conclusion was based, at least in part, on concern for reading Title VI most advantageous to historically disadvantaged groups. The same concern should lead not to the overturning of *Lau* but rather to a strong reaffirmance of it. Note, *Maintaining Health Care in the Inner City: Title VI and Hospital Relocation, 55 N.Y.U. L. Rev.* 271, 290, 291 n.100 (1980).

The focus in *Bakke* was on whether Congress intended to be more restricting than the Fourteenth Amendment allows with respect to voluntary affirmative action programs. Justice Brennan's opinion makes this crystal clear. After citing House Judiciary Chairman Celler, Justice Brennan concludes:

> It was clear to Representative Celler that Title VI, apart from the fact that it reached all federally funded activities even in the absence of sufficient state or fed-

> eral control to invoke the Fourteenth or Fifth Amendments, was not placing *new substantive limitations* upon the use of racial criteria but rather was designed to extend to such activities "the existing right to equal treatment" enjoyed by Negroes under those amendments. . . . *Id.* at 330.

This passage highlights two important features of Title VI. First, its drafters did not place "new substantive limitations" on the use of racial criteria. This, of course, was directly relevant in *Bakke*, where the issue was whether Congress intended to be more proscriptive through Title VI than was required by the Constitution. Second, its drafters intended to go beyond then current state action doctrine. *See Simkins* v. *Moses H. Cone Hospital*, (*en banc*) 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) to reach discrimination by recipients of federal assistance. (Remarks of Senator Allot) 110 Cong. Rec. 12,677 (1964).[9]

2. *It Is Consistent With* Bakke *to Allow Satisfaction of Title VI by Proof of Disparate Impact on Racial Minorities.*

Thus, the coextensiveness between Title VI and the Constitution discussed in *Bakke* is not conclusive as to whether Congress intended Title VI to have a broader reach than the Constitution in protecting minority persons. Nothing in *Bakke* addresses this, the crucial question now before

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[9] While several Senators spoke approvingly of *Simkins*, *supra*, which applied the Fourteenth Amendment to hospitals which participated integrally in a state-federal scheme to "effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health," 323 F.2d at 967, Title VI went beyond *Simkins* in requiring non-discrimination by recipients of any federal monies. This shows that Congress did not merely incorporate constitutional standards in Title VI. It went beyond these where necessary to get at pernicious and persistent discrimination.

this Court. It is consistent to conclude that Congress did not intend Title VI to prevent voluntary action aimed at eradicating the effects of discriminatory practice, whether intended or not, and did intend it to reach challenged conduct with disparate effects upon racial minorities.

Indeed, when judged by the statements of the sponsors and supporters of Title VI, arguments for such a complimentary reading are compelling. For instance, Senator Pastore explained in detail the necessity for Title VI by reference to both the school lunch program, which, apparently, was not reaching needy blacks: ["[T]his disparity (in usage of the program in Greenwood County, Alabama,) appears to be in inverse proportion to need since the average Negro income is approximately one-half the white average."] (110 Cong. Rec. 7055) (1964) and the *de facto* segregation in state employment services. (*Id.* at 7058). In neither instance did Senator Pastore mention discriminatory intent on the part of program administrators; he simply wanted a vehicle by which the federal funding authority could insure that blacks in need received the benefits it distributed. (See 110 Cong. Rec. 7101 (Remarks of Senator Javits) (1964). As Senator Humphrey stated, reiterating President Kennedy's remarks, "Simple justice requires that public funds, to which all taxpayers contribute, not be spent in *any* fashion which encourages, entrenches, subsidize or results in discrimination." 110 Cong. Rec. 6543. (emphasis added).

In light of this legislative history and the strong textual reasons for maintaining an effects or impact standard of proof under Title VI, this court should reaffirm *Lau*. The Chief Justice, in his recent plurality opinion in *Fullilove* v. *Klutznick*, reaffirmed the vitality and logic of *Lau* as follows:

"There are relevant similarities between the MBE program and the federal spending program reviewed in *Lau*

v. *Nichols*, 414 U.S. 563 (1974). In *Lau*, a language barrier 'effectively foreclosed' non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. *Id.*, at 564-566. It had not been shown that this had resulted from any discrimination, purposeful or otherwise, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of 'criteria or methods of administration *which have the effect* . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] program as respect individuals of a particular race, color, or national origin.' *Id.*, at 568 (emphasis added). Moreover, we upheld application to the San Francisco school system, as a recipient of federal funds, of a requirement that '[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.' *Ibid.*

It is true that the MBE provision differs from the program approved in *Lau* in that the MBE program directly employs racial and ethnic criteria as a means to accomplish congressional objectives; however, these objectives are essentially the same as those approved in *Lau*. Our holding in *Lau* is instructive on the exercise of congressional authority by way of the MBE provision. The MBE program, like the federal regulations reviewed in *Lau*, primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions. The MBE participation requirement is directed at the utilization of criteria, methods

or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations. 448 U.S. at 479-80 (1980)."

As in *Fullilove*, the monies received by the New York Police Department in this instance have been voluntarily sought and should be used in a manner consistent with the Congressional resolve—to integrate and include minorities in the mainstream of American life and the specific agency regulations governing their grant.[19]

C. Imposition of an Intent Standard Will Frustrate and Make Less Effective Federal Enforcement of Civil Rights Statutes and Regulations.

For nearly two decades, federal agencies have been scrutinizing fund recipients' conduct with an effect standard. No party before this Court complains of the burdensomeness of this standard. Indeed, there is presented no substantial practical reason to overrule the experience of these years. On the other hand, imposition of an intent requirement will make much more difficult enforcement of antidiscrimination provisions. Instead of using statistical reports to determine whether all groups are using and benefiting from programs supported by federal monies, the relevant federal agencies will become engaged in the subjective process of seeking first to determine and then to prove in court that recipients intended to deny or exclude blacks from the benefits of their programs. This prospect is most clearly not what Senator Humphrey and others contemplated when they envisioned regulations allowing

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[19] These regulations uniformly prohibit the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination," 29 C.F.R. § 31.3(b)(2) (Labor), 29 C.F.R. § 1.4(b)(2) (HUD) and 28 C.F.R. § 42.104(1)(2) (Justice).

federal agencies to ensure, in a straightforward and certain manner, that minorities were receiving the benefits of federal programs.

Moreover, the obligation on the federal government not to discriminate or be complicit in local discriminatory activity is a fundamental national imperative. *Cooper* v. *Aaron*, 358 U.S. 1 (1958). Requiring proof of intent to discriminate where the evidence is clear that recipients are excluding minorities from the benefits of federal programs is tantamount to erring on the side of federal complicity with discriminators. A judicial focus on the state of mind of the receiving institution rather than upon identifying any exclusion and finding ways to remedy it is contrary to Title VI's legislative history.

Finally, there is convincing evidence that Congress has ratified the current effect standard, as applied by all but one federal agency. For instance, in 1966, the Senate defeated an amendment offered by Senator Ervin to require proof of intent under Title VI. 112 Cong. Rec. 10061. In intervening years, Congress has ratified by its silence the civil rights enforcement activity of many federal agencies without ever amending Title VI or the numerous regulations, incorporating an effects standard. This ratification by silence, while not always dispositive, should be weighed by this Court, particularly in light of the visibility of Title VI enforcement.

D. An Intent Requirement Is Not Dictated by the Severe Consequences of Violation of Title VI.

Several courts have argued that since Title VI allows the termination of federal financial assistance against those found guilty of violating it, Congress must have required a stringent standard of proof. Choosing such a severe sanction, the argument proceeds, Congress must

have intended an intent standard. Apart from ignoring Congress' rejection of the Ervin Amendment, this argument misses the essential point of Title VI. Congress desired to continue making federal funds available for a myriad of local purposes. It assumed that recipients would want to receive these funds and would comply in good faith with national non-discrimination policies. Should a recipient be found out of compliance, due to the effect of its programs on minorities, the funding agency was responsible for seeking compliance. Congress assumed that the local recipient would react in a manner curative of the exclusion or denial of benefits to minorities. In such an event, no fund termination would occur. If, once informed that its programs discriminatorily excluded minorities, a recipient refused to make amends, then and only then would the responsible federal agency begin enforcement action, culminating in termination. In such a situation, where termination follows efforts at conciliation and mutual effort toward curative action, it does not appear to be such a harsh and sudden remedy.

CONCLUSION

In light of the nation's positive experience with Title VI, as interpreted by responsible federal agencies, the weight of the legislative history and the text of the statute itself, this court should reaffirm *Lau* and insure a positive federal role in removing the vestiges of discrimination and segregation. Particularly in the employment discrimination area, where an effects standard is otherwise the law of the land, a contrary ruling would be anomalous and unwarranted.

Respectfully submitted,

THOMAS I. ATKINS
General Counsel

MICHAEL H. SUSSMAN
Assistant General Counsel
NAACP SPECIAL CONTRIBUTION FUND
1790 Broadway, 10th Fl.
New York, N.Y. 10019
212-245-2100

(with the assistance of ELLEN SAIDEMAN, Columbia University Law School, 1982)

Amicus Brief

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IN THE

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THE GUARDIANS ASSOCIATION, *et al.*,
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OF THE CITY OF NEW YORK, *et al.*,
Respondents.

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BRIEF FOR THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE

MARGARET FUNG
STANLEY MARK
Asian American Legal Defense and Education Fund
350 Broadway, Suite 308
New York, New York 10013
(212) 966-5932

VILMA S. MARTINEZ
MORRIS J. BALLER
CARMEN A. ESTRADA
Mexican American Legal Defense and Educational Fund
28 Geary Street, 6th Floor
San Francisco, Calif. 94208
(415) 981-5800

Of Counsel:

ROGER L. WALDMAN*
PATRICIA J. LANGER
MIRIAM L. SPARROW
1 Rockefeller Plaza
New York, New York 10020
(212) 957-9800

* Counsel of Record

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No. 81-431

IN THE

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OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,

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Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF FOR THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE

INTERESTS OF AMICI CURIAE

The Asian American Legal Defense and Education Fund (AALDEF) is a nonprofit corporation established in 1974 under the laws of the States of California and New York. It was formed to protect the civil rights of Asian Americans through litigation and the dissemination of public information.

Since 1965 there has been a dramatic increase in Asian immigration to the United States, with Asians now comprising one-third of the legal immigration to this country each year.[1] A primary concern of AALDEF is guaranteeing that children of Asian ancestry who do not speak English receive adequate instructional programs in accordance with this Court's mandate in *Lau* v. *Nichols*, 414 U.S. 563 (1974). AALDEF believes that unless Asian American children receive equal access to educational opportunity, language barriers will continue to prevent Asian Americans from attaining full participation in the economic, political and social life of our country.

The Mexican American Legal Defense and Education Fund (MALDEF) was founded in 1968 as a nonprofit corporation under the laws of the State of Texas and is headquartered in San Francisco, California. Its principal purpose is to uphold the civil rights of persons of Mexican descent through the prosecution of lawsuits and the education of the public.

One of the primary interests of MALDEF is compelling federal enforcement of Title VI of the Civil Rights Act of

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[1] *See* U.S. Comm'n on Civil Rights, Civil Rights Issues of Asian and Pacific Americans: Myths and Realities 11 (1979), *citing* annual reports of the Immigration and Naturalization Service.

1964 ("Title VI"), particularly in the area of education.[2] MALDEF is now monitoring the compliance of approximately 82 school districts with the "effects" standard adopted in *Lau* v. *Nichols*.[3] Pursuant to *Lau* the Department of Health, Education and Welfare developed policy guidelines specifying four steps a school district should take in developing a voluntary compliance plan.[4] Most of the voluntary plans adopted by school districts that enroll students entitled to protection under *Lau* follow these requirements.

Much of the discrimination minorities encounter is subtle in nature, built into the operation of organizations and their supporting social structures. This discriminatory process often converts facially neutral acts into further forms of discrimination. Noting this phenomenon, the United States Commission on Civil Rights recently concluded that the best way to determine whether discrimination exists is to examine statistics to see if they demonstrate a discriminatory effect. The Commission said:

> Apparently rational arguments can mask discriminatory behavior, and even neutral efforts can

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[2] A 1976 survey found that approximately five million school-age children have mother tongues other than English or live in households in which languages other than English are spoken. Sixty percent of these children are of Spanish-language background. National Center For Education Statistics, NCES 78-134, Geographic Distribution, Nativity, and Age Distribution of Language Minorities in the United States: Spring 1976 (August 22, 1978).

[3] MALDEF was involved in two lawsuits against the Office of Civil Rights, *Adams* v. *Califano*, U.S.C.A., D.C. Cir., No. 73-1273 and *Brown* v. *Califano*, U.S.D.C., D.D.C., No. 75-1068. A consolidated settlement was reached in which, *inter alia*, the Office of Civil Rights agreed to complete 82 *Lau* reviews and substantially review *Lau* agreements. MALDEF is monitoring compliance with the settlement terms.

[4] HEW, Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau* v. *Nichols* (Summer 1975).

> unintentionally cause discriminatory results. In such circumstances the best available means for detecting the possible presence of discriminatory processes is to examine their statistical outcomes. U.S. Comm'n on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination 2 (November 1981).

Amici view with great concern any change from this Court's holding in *Lau* that a showing of discriminatory effect is sufficient to establish a violation under Title VI. Their experience has been that the rule enunciated in *Lau* is essential to progress in eliminating discrimination, and that its overturn would have a disastrous effect on efforts to end discriminatory behavior.[5]

SUMMARY OF ARGUMENT

In *Lau* v. *Nichols,* 414 U.S. 563 (1974), this Court correctly held that acts having a discriminatory effect constitute a violation of Title VI. Several indicia demonstrate Congress's intent that Title VI prohibit both purposeful and nonpurposeful discrimination. First, Congress failed to define "discrimination" in Title VI, and it limited the term "discrimination" in Title IV. Second, agencies promulgating regulations under Title VI adopted an "effects" test, and Congress never questioned the standard. Third, since enacting Title VI, Congress has passed ten subsequent statutes ratifying the "effects" standard.

Even if Title VI prohibits only purposeful discrimination, agency regulations promulgating an "effects" test are valid under *Mourning* v. *Family Publications Services, Inc.,* 411 U.S. 356 (1973), because an "effects" test is a reasonable way to effectuate the purpose of detecting and eliminating intentional discrimination. An "effects" test is reasonable because of (a) the difficulty of proving

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[5] The parties' written consents to the filing of this brief are being filed with the clerk pursuant to Rule 36.2 of the Supreme Court.

intentional discrimination and (b) the need for objective criteria in administering thousands of government grants. The regulations at issue here which set forth an "effects" test should accordingly be upheld even if this Court finds that the scope of Title VI is limited to purposeful discrimination.

ARGUMENT

POINT I

CONGRESS INTENDED THAT TITLE VI CONTAIN AN "EFFECTS" TEST

In *Lau* v. *Nichols*, 414 U.S. 563, 568 (1974), this Court squarely held that acts having a discriminatory effect constitute a violation of Title VI.[6] The Court said that "Discrimination is barred which has that [discriminatory] *effect* even though no purposeful design is present." (emphasis in original).

The Court's holding in *Lau* as to the scope of Title VI was correct. As will be seen, three separate indicia demonstrate that Congress intended that Title VI bar nonpurposeful, as well as purposeful, discrimination.

A. Congress Did Not Define the Meaning of "Discrimination" Under Title VI, and It Used Express Words of Limitation When It Wished to Limit Coverage to Intentional Discrimination in Title IV

In enacting Title VI Congress did not define the term "discrimination," although members of both the House and Senate clearly were aware that the word had no fixed meaning. Representatives Poff and Cramer, who were present at the House hearings, expressed their criticism of the original version of the bill in questioning what the phrase "subjected to discrimination" meant. (House Comm. on the Judiciary, Civil Rights Act of 1963, H.R. Rep. No. 914, 88th Cong., 1st Sess. 56 (1963), *reprinted in* [1964] U.S. Code Cong. & Ad. News 2391, 2473 (minority

[6] 42 U.S.C. § 2000d *et. seq.* (Civil Rights Act of 1964).

report)). In the Senate, Senators Eastland and Ervin asked the same question and received no clarification. 110 Cong. Rec. 5863 (1964). Yet despite the fact that questions had been raised in both Houses as to what types of discrimination would be covered in the absence of further definition, Congress chose not to define "discrimination."

Congress was well aware that its failure to define "discrimination" could lead to Title VI's application to nonpurposeful discrimination. In debate several representatives and senators specifically expressed fear that "discrimination" might include racial imbalance, a term then used to describe nonpurposeful discrimination (remarks of Rep. Cramer, Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 1424 (1963); Rep. Meader, *Id.* at 1580; Sen. Byrd, 110 Cong. Rec. 12320 (1964)). Despite this concern no change was made to exclude racial imbalance from the type of discrimination proscribed by the statute.

Congress thus was clearly aware that "discrimination" was susceptible of varying interpretations[7] and that one potential interpretation included acts having a discriminatory effect or impact. By refusing to limit the term, Congress must have intended that "discrimination" be given its broadest meaning, a meaning that would include what was then called "racial imbalance" and is now termed "discriminatory effects" or "discriminatory impact."

That Congress intended Title VI to reach beyond purposeful discrimination is further demonstrated by its contemporaneous use of limiting language to prevent such a result in Title IV,[8] drafted at the same time as Title VI. During debate busing opponents in the Senate expressed

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[7] *See Regents of the University of California* v. *Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J.).

[8] 42 U.S.C. § 2000c-6.

concern that the broad language of Title VI would require that "school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist." 110 Cong. Rec. 12715 (1964) (remarks of Sen. Byrd). In response the Senate amended Title IV, which covers public school desegregation, to add an explicit limitation prohibiting school busing orders to achieve racial balance in cases of *de facto* segregation.[9] To limit the term "discrimination" in that title, Congress specifically prohibited "any official or court of the United States" from "otherwise enlarg[ing] the existing power of the court to insure compliance with constitutional standards." The use of limiting language in Title IV demonstrates that had Congress intended "discrimination" in Title VI to be limited to intentional discrimination, it would have used express words of limitation there as well.[10]

B. Agencies Charged With Implementing Title VI Promulgated Regulations Adopting an "Effects" Test and Congress Took No Action Suggesting That the Agency Actions Were Wrong

Pursuant to the congressional delegation of authority in § 602 of Title VI, 42 U.S.C. § 2000d-1,[11] most federal agencies promulgated regulations under Title VI shortly

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[9] Although the amendment was passed as part of Title IV, legislative history specifically indicates it was intended to pertain to the entire Act. 110 Cong. Rec. 12715 (1964) (remarks of Sen. Humphrey). It is unlikely that the Senate would have deemed it necessary to draft this amendment unless it believed that without it Title VI would permit busing to remedy *de facto* school segregation.

[10] Congress has drafted statutory language that explicitly requires intent in other contexts as well. *See, e.g.*, 15 U.S.C. § 72 (unfair competition); 29 U.S.C. § 666(a) (occupational safety).

[11] Congress directed executive departments and agencies to adopt their own regulations for enforcement of § 601, 42 U.S.C. § 2000d, the general nondiscrimination clause, the only limitation being that the regulations "be consistent with the achievement of the objectives" of the underlying federal programs.

after its passage. Virtually all federal agencies adopted an "effects" test as the standard of "discrimination."[12]

As this Court noted in *Lau* v. *Nichols*, 414 U.S. at 571, administrative regulations are "entitled to great weight" in construing a statute. *See also Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971). Deference to the administrative interpretation of the meaning of "discrimination" in Title VI is especially warranted here, where the interpretation " 'involves a contemporaneous construction of a statute by the men charged with setting its machinery in motion.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964), quoting *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961).

Further, the agency regulations adopting an "effects" standard were promulgated over fifteen years ago, and neither at the time of promulgation nor at any time since has Congress taken any action suggesting that the agencies misinterpreted Title VI or exceeded their authority. "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpreta-

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[12] ACTION, 45 C.F.R 1203.4(b)(2); Dept. of Agriculture, 7 C.F.R. 15.3(b)(2); Nuclear Regulatory Commission, 10 C.F.R. 4.12(b); AID, 22 C.F.R. 209.4(b)(2); CAB, 14 C.F.R. 379.3(b)(2); Dept. of Commerce, 15 C.F.R. 8.4(b)(2) and (3); Office of Personnel Management, 5 C.F.R. 900.404(b)(2); Dept. of Defense, 32 C.F.R. 300.4(b)(2); EPA, 40 C.F.R. 7.4(b)(2); Federal Home Loan Bank Board, 12 C.F.R. 529.4(b)(2); Federal Property Management Regulations, 41 C.F.R. 101-6.204-2(a)(2) and (3); HEW, 45 C.F.R. 80.3(b)(2) and (3); HUD, 24 C.F.R. 1.4(b)(2)(i) and (b)(3); Dept. of Interior, 43 C.F.R. 17.3(b)(2) and (3); Department of Justice, 28 C.F.R. 42.104(b)(2) and (3); Dept. of Labor, 29 C.F.R. 31.3(b)(2) and (3); NASA, 14 C.F.R. 1250.103-2(a)(3) and (b); National Foundation on the Arts and Humanities, 45 C.F.R. 1110.3(b)(2) and (3); National Science Foundation, 45 C.F.R. 611.3(b)(2); Community Services Administration, 45 C.F.R. 1010.10-2(b) and (c); Dept. of State, 22 C.F.R. 141.3(b)(2); Dept. of Transportation, 49 C.F.R. 21.5(b)(2) and (3); TVA, 18 C.F.R. 1302.3(b)(2) and (3); Veterans Administration, 38 C.F.R. 18.3(b)(2) and (3); Water Resources Council, 18 C.F.R. 705.4(b)(2).

tion is the one intended by Congress." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

C. Subsequently Enacted Statutes Have Ratified the "Effects" Standard

Finally, Congress's action with respect to subsequent legislation demonstrates that it did not intend Title VI to be limited to purposeful discrimination. Since enacting Title VI Congress has enacted ten additional statutes containing clauses modeled on the nondiscrimination clause of Title VI, § 601.[13] Congress chose not to limit the meaning of "discrimination" in any of these statutes, despite its awareness that the Title VI enforcement agencies had interpreted "discrimination" as embracing an "effects" standard.

In addition to repeating the Title VI formula with full knowledge of the agencies' interpretation, Congress specifically endorsed Title VI regulations containing the "effects" standard when it enacted the Public Works Employment Act of 1976. The statute states:

> This [nondiscrimination] provision will be enforced through agency provisions and *rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964.* 42 U.S.C. § 6709 (emphasis added).

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[13] 20 U.S.C. § 1681(a) (Title IX of the Educational Amendments of 1972); 29 U.S.C. § 794 (Rehabilitation Act of 1973); 31 U.S.C. § 1242 (Revenue Sharing Act) (1976); 42 U.S.C. § 3766(c)(1) (Crime Control Act of 1973); 42 U.S.C. § 5309 (Housing & Community Development Act of 1976); 42 U.S.C. § 5672(b) (Juvenile Justice Act of 1974); 42 U.S.C. § 6102 (Age Discrimination Act (1975)); 42 U.S.C. § 6709 (Public Works Employment Act (1976)); 42 U.S.C. § 6870(a) (Energy Conservation & Resource Renewal Act of 1976); 45 U.S.C. § 803 (Railroad Revitalization and Regulatory Reform Act) (1976).

The indicia discussed above show that Congress intended that Title VI prohibit both purposeful and nonpurposeful discrimination. This Court's decision in *Lau* v. *Nichols* that acts having a discriminatory effect constitute a violation of Title VI was correct.

POINT II

WHETHER OR NOT CONGRESS INTENDED THAT TITLE VI CONTAIN AN "EFFECTS" TEST, THE AGENCY REGULATIONS PROMULGATED THEREUNDER WHICH SET FORTH AN "EFFECTS" TEST ARE VALID AND ENFORCEABLE

Pursuant to § 602 of Title VI, each of the agencies involved in this case has promulgated regulations forbidding procedures that "have the *effect* of defeating... the objectives of the program as respects individuals of a particular race, color, or national origin." (emphasis added).[14] Whether or not Congress intended that Title VI contain an "effects" test, these regulations are valid and enforceable because such regulations are reasonably related to the purpose of Title VI.

The test for determining the validity of a regulation promulgated by an agency under a statutory delegation such as § 602 was set forth in *Mourning* v. *Family Publications Services, Inc.*, 411 U.S. 356, 369 (1973), where the Court held that a regulation will be upheld "so long as it is reasonably related to the purpose of the enabling legislation." *See also Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969); *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974). In applying the standard, this Court has not hesitated to uphold regulations that go

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[14] 24 CFR § 1.4(b)(2)(i) (Dep't of Housing and Urban Development); 28 CFR § 42.104(b)(2) and (3) (Dep't of Justice); 29 CFR § 31.3(b)(3) (Dep't of Labor).

beyond the statute pursuant to which they were promulgated. Indeed, *Mourning* was just such a case, the Court there upholding a regulation promulgated under the Truth in Lending Act that was concededly broader than the Act. In doing so the Court recognized that, particularly where the transactions or conduct sought to be regulated occur in changing forms, a regulation broader than the statute may be necessary to assure that the transactions the statute was specifically designed to cover are reached. The Court said:

> Where, as here, the transactions or conduct which Congress seeks to administer occur in myriad and changing forms, a requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. *Mourning*, 411 U.S. at 374.

Intentional discrimination, like the conduct addressed in *Mourning*, occurs in "myriad and changing forms." Assuming Congress intended to reach only intentional discrimination in Title VI, it would still be reasonable, perhaps essential, for agencies administering the statute to promulgate an "effects" test. Indeed, given the extreme difficulty of proving subjective intent, any agency that opted instead for an intent test would almost surely permit many intentionally discriminatory acts to escape regulation.

The difficulty of proving intentional discrimination has been specifically recognized by Congress. In enacting Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, Congress specifically rejected an amendment that would have required proof of discriminatory intent, because in Senator Percy's words, such "proof would be impossible

to produce." 114 Cong. Rec. 5216 (1968). It has also been recognized by the courts. In *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), the Court of Appeals for the Seventh Circuit rejected an intent test for Title VIII on just such grounds, stating:

> [A] requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to to satisfy. 'Intent, motive and purpose are elusive subjective concepts,' and attempts to discern the intent of an entity such as a municipality are at best problematic. A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. *Id.*

See also Resident Advisory Board v. *Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *U.S.* v. *City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

An "effects test" is reasonable not only because of the difficulty of proving intent, but also because of the need for objective criteria and certainty in administering thousands of government grants under Title VI. An "effects" test provides a standard both objective and easily administered, elements critical to successful enforcement of the Act by the agencies and equally important to recipients striving to be in voluntary compliance.

The question of whether an "effects" test is an appropriate mechanism for enforcement of a constitutional

prohibition against intentional discrimination has already been answered affirmatively by this Court in another context. In *City of Rome* v. *United States*, 446 U.S. 156 (1980), the question before the Court was whether legislation enacted under the enabling clause of the Fifteenth Amendment could properly adopt an "effects" test although the Fifteenth Amendment itself only barred intentional discrimination. The Court held that it could, on the ground that Congress could rationally have concluded that an "effects" test was an appropriate method of effectuating the Amendment's objective of eliminating intentional discrimination.

Just as Congress could rationally conclude that an "effects" test was an appropriate mechanism to effectuate the Fifteenth Amendment's objective of eliminating intentional discrimination, so federal agencies directed to issue regulations under Title VI could rationally conclude that an "effects" test was an appropriate mechanism to effectuate the purpose of a Title VI directed at intentional discrimination.

The issue, it must be emphasized, is not whether an "effects" test is the only way the purposes of Title VI can be effectuated, but whether it is a reasonable way to do so. *Amici* submit that an "effects" test is a reasonable method to detect and regulate intentional discrimination, and that accordingly, even if this Court should hold that Title VI's purposes go no further than the Fourteenth Amendment, the federal regulations at issue herein should be upheld under the doctrine laid down in *Mourning* v. *Family Publications Services, Inc.*

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed.

Respectfully submitted,

MARGARET FUNG
STANLEY MARK
Asian American Legal Defense and Education Fund
350 Broadway, Suite 308
New York, New York 10013

VILMA S. MARTINEZ
MORRIS J. BALLER
CARMEN A. ESTRADA
Mexican American Legal Defense and Education Fund
28 Geary Street, 6th Floor
San Francisco, California 94208

Of Counsel:

ROGER L. WALDMAN*
PATRICIA J. LANGER
MIRIAM L. SPARROW
1 Rockefeller Plaza
New York, New York 10020

* Counsel of Record

March 27, 1982

Amicus Brief

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ALEXANDER L. STEVAS,

No. 81-431

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Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
THOMAS R. BAGBY
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae, Equal Employment Advisory Council

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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Respondents.

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

This brief amicus curiae of the Equal Employment Advisory Council (EEAC) is respectfully submitted pursuant to the written consent of the named parties,[1] and in support of the respondents.

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to 42 U.S.C. § 1981 as well as other equal employment statutes and regulations. In addition, many of EEAC's members are subject to Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.*), or other federal statutes modeled after Title VI. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e., whether proof of intent to discriminate is necessary to establish violations of Title VI and § 1981.

Because of its interest in the issue of the nature of proof required to establish a violation of § 1981, EEAC has filed briefs as amicus curiae in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) (case dismissed on other grounds as moot) and in *General Building Contractors Association, Inc., et al. v. Commonwealth of Pennsylvania, et al.* (Supreme Court Nos. 81-280, 81-330, 81-331, 81-332 and 81-333). In addition, EEAC has filed amicus briefs in other cases involving an analysis of the legislative history of Title VI. *See, e.g., North*

Haven Board of Education, et al. v. Terrel H. Bell, et al. 50 U.S.L.W. 4501 (U.S. May 17, 1982). On numerous other occasions, EEAC has filed briefs as amicus curiae in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

Plaintiffs, as representatives of minority police officers on the New York City Police Department, filed suit against various agencies and officials of the City of New York alleging discrimination on behalf of black and Hispanic police officers laid off in June 1975. Plaintiffs alleged that the layoffs violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Between 1968 and 1970, the New York City Department of Personnel administered a number of civil service examinations for the position of New York City police officer. Each examination resulted in eligibility lists, with candidates rank-ordered based on their test scores. Each of the tests was administered and the eligibility lists established prior to March 24, 1972, the date Title VII coverage was extended to state and local governments. A hiring freeze was in effect from May 1970 to January 1973. Nearly all of the appointments from the eligibility lists were made between January 1973 and October 1974 when the lists were exhausted. In October 1974, another hiring freeze was imposed.

On June 30, 1975, the Police Department, for budgetary reasons, laid off over 2,500 police officers. The layoffs were made in accordance with New York state law which required them to be on a "last-hired-first

fired" basis. In May 1975, plaintiffs filed discrimination charges with EEOC, and on April 30, 1976, commenced the instant lawsuit. Plaintiffs alleged that but for the discriminatory examinations given between 1968-70, they would have been appointed earlier and would have accrued sufficient seniority to withstand the layoffs.

In an opinion reported at 466 F. Supp. 1273 (S.D.N.Y. 1979) (Carter, J.) the district court found that the eligibility lists were based on tests which were unlawfully discriminatory and that the use of the lists after March 24, 1972, constituted a "discriminatory refusal to hire" in violation of Title VII. The court found that all blacks and Hispanics hired after March 24, 1972, were entitled to relief under Title VII and that relief under Title VII could extend back only to that date. The court, however, held that claims under Title VI had been established based upon the "impact" of defendants' practices and that it was not necessary to show "intentional or purposeful" discrimination in order to prevail on the Title VI claims. Since Title VI was enacted in 1964, the court found that all of the plaintiff class appointed from the 1968-70 examinations were eligible for relief. Finding that the plaintiffs had not established the intentional discrimination necessary to establish claims under §§ 1981 and 1983, the court dismissed those claims.

On appeal, the Second Circuit panel, in a decision reported at 633 F.2d 232 (2d Cir. 1980), affirmed the finding of liability under Title VII and the denial of relief under §§ 1981 and 1983, and reversed the finding of liability based on Title VI. Judges Kelleher and Coffrin, sitting by designation, rejected the Title VI claim on the ground that "intentional or purposeful" discrimination necessary in order to establish a claim under Title VI had not been shown. Judge Meskill rejected the claim because he did not believe that Title VI contained an

implied individual right of action for compensatory relief. Petitions for rehearing, with suggestions for rehearing by the Second Circuit *en banc*, were denied.

SUMMARY OF ARGUMENT

In order to demonstrate violations of either Title VI or § 1981, it is necessary to establish proof of intentional or purposeful discrimination. The requirement of intentional or purposeful discrimination under Title VI and § 1981 is consistent with the intent of the enacting Congresses and with prior decisions of this Court.

A majority of the Court concluded in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), that Title VI prohibits only those racial classifications which would also violate the Fifth or Fourteenth Amendment. Justice Powell, based upon the similarity of language between Title VI and the Equal Protection Clause, and upon the intent of Congress to incorporate a constitutional standard into Title VI and to define "discrimination" by reference to the Constitution, concluded that Title VI proscribes only those acts which would also violate the Equal Protection Clause or the Fifth Amendment. Likewise, the opinion of Justice Brennan, joined by Justices White, Marshall and Blackmun, agreed with Justice Powell that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." *Id.* at 325. Since intentional or purposeful discrimination must be proved in order to establish a violation of the Fifth or Fourteenth Amendments, the same proof of intent is required under Title VI. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

Since *Lau v. Nichols*, 414 U.S. 563 (1974), was decided prior to the Court's clarification in *Washington v.*

Davis of the proof required in order to establish a violation of the Fifth or Fourteenth Amendment, *Lau* does not dictate an "effects" standard under Title VI. The continuing vitality of *Lau* was questioned by the Brennan opinion in *Bakke*, where "serious doubts" were expressed regarding the correctness of the holding. In any event, *Lau* should be expressly overruled as inconsistent with the Court's subsequent decision in *Bakke* and with the will of Congress.

The legislative history of Title VI conclusively demonstrates that Congress intended to incorporate a constitutional standard of discrimination into Title VI. The Congressional debates repeatedly emphasized that Title VI would prohibit only those acts of discrimination which would also violate the Constitution. The legislative history also reveals that Title VI was designed to insure that federal funds would be spent in accordance with the Constitution, 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey), and merely provides the means of enforcing such a restriction. *Id.* at 13333 (remarks of Sen. Ribicoff).

The determination of the court of appeals that a violation of § 1981 can only be established upon a showing of an intent to discriminate is consistent with the will of Congress as expressed in the legislative history of § 1981 and the decisions in this Court and numerous other courts of appeals.

Section 1981 shares a unique common history with the equal protection clause of the Fourteenth Amendment and is expressive of the same Congressional policies. Given this close relationship of § 1981 with the Fourteenth Amendment, the standard of proof for § 1981 should be consistent with that required for Fourteenth Amendment claims.

Section 1981, by guaranteeing to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," is fundamentally an equal protection statute. In *Washington v. Davis*, the Court held that proof of a racially discriminatory intent or purpose is required in order to establish an equal protection violation. The same proof of intent should be required under § 1981.

The legislative history of § 1981 establishes that Congress was concerned with acts of intentional discrimination designed to deny to blacks their basic civil rights. Nothing in the legislative debates evidences Congressional concern over facially neutral practices with a discriminatory impact or any other actions undertaken without an intent to discriminate.

Prior decisions of the Court have found violations of § 1981 and other Reconstruction era civil rights statutes only where there has been evidence of intentional discrimination. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976).

Since the equal protection clause of the Fourteenth Amendment and § 1981 are virtually coextensive, the adoption of an "impact" standard for claims under § 1981 would jeopardize "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome on the poor and to the average black than to the more affluent white." *Washington v. Davis*, 426 U.S. at 248. This was precisely the result which the Court sought to avoid in *Washington v. Davis*. In addition, if an "impact" standard is adopted under § 1981, claimants will be encouraged to circumvent Title VII conciliation and limitation requirements simply by alleging § 1981 claims instead of or in addition to Title VII claims.

ARGUMENT

I. PROOF OF INTENTIONAL OR PURPOSEFUL DISCRIMINATION IS REQUIRED IN ORDER TO ESTABLISH A VIOLATION OF TITLE VI.

A. Prior Decisions Of This Court Indicate That Proof Of Intent Is Required In Order To Establish A Violation Of Title VI.

In a number of recent decisions, the Court has clearly indicated that the standard for proof of discrimination under Title VI [2] is the same as that required for proof of an equal protection claim under the Fifth or Fourteenth Amendments to the Constitution. Since the Court has held that proof of an equal protection claim requires a showing of intentional or purposeful discrimination, the same showing of intentional or purposeful discrimination is required in order to establish a claim under Title VI. The decision of the Second Circuit herein is wholly consistent with the decisions of this Court which establish that Title VI requires proof of intentional or purposeful discrimination.[3]

In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), a majority of the Court concluded that

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[2] Section 601 of Title VI, 42 U.S.C. § 2000d, provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[3] Other court of appeals decisions have held or implied that proof of intent is required in order to establish a violation of Title VI. *See, e.g., Lora v. Board of Ed. of City of New York*, 623 F.2d 248 (2d Cir. 1980); *United States v. Marion County School District*, 625 F.2d 607 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *Castanada v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Detroit Police Officers' Ass'n. v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 981 (1981). *But see NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981).

Title VI prohibits only those racial classifications which would also violate the Fifth or the Fourteenth Amendment. Justice Powell, in his separate opinion, began by stating that "[t]he language of § 601, 78 Stat. 252, *like that of the Equal Protection Clause*, is majestic in its sweep . . . ." *Id.* at 284 (emphasis added). After an exhaustive review of the legislative history of Title VI, Justice Powell stated that an "[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination *similar to that of the Constitution*." *Id.* (emphasis added).[4]

Justice Powell found additional evidence of the incorporation into Title VI of a constitutional standard in the failure of its supporters to define the term "discrimination." In so doing, Justice Powell relied upon statements of proponents of Title VI "that the meaning of 'discrimination' would be made clear by reference to the Constitution or other existing law." *Id.* at 286-87. Thus, based upon the similarity between the language of Title VI and the Equal Protection Clause, and upon Congress' intent to incorporate a constitutional standard into Title VI and to define "discrimination" by reference to the Constitution, Justice Powell concluded that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287.

Similarly, Justice Brennan, in his opinion joined by Justices White, Marshall and Blackmun, (hereinafter referred to as the Brennan opinion), "agree[d] with Mr. Justice POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." *Id.* at 325. After stating that "Title

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[4] For a discussion of the legislative history of Title VI, see part I-b above.

VI . . . merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds," *id.* at 327, the Brennan opinion concluded that "[i]n our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . . ." *Id.* at 328.[5]

In a discussion of the Congressional purpose in enacting Title VI, the Brennan opinion stated:

> The history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities *in a manner that would be prohibited by the Constitution if engaged in by government.*

Id. at 329 (emphasis added).[6]

Similarly, after a review of the legislative history of Title VI, the Brennan opinion stated that:

> Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs

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[5] The Brennan opinion further reiterated its understanding that Title VI incorporated constitutional standards when it stated that "[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution *in a manner inconsistent with the standards incorporated in the Constitution.*" *Id.* at 332 (emphasis added).

[6] Similarly, the opinion stated that Title VI was intended "to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the Fourteenth and Fifth Amendments upon state and federal action." *Id.* at 330.

> and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the Fifth and Fourteenth Amendments but whose activities might not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards contained in the Fourteenth and Fifth Amendments. *Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.*

Id. at 335-36 (emphasis added).

The Brennan opinion, in agreement with the opinion of Justice Powell, viewed the legislative history as clearly establishing Congress' intent that the definition of "discrimination" in Title VI would evolve in accordance with the Constitution. Regarding the failure to include a definition of discrimination in Title VI, the Brennan opinion stated that "[s]pecific definitions were undesirable, in the views of the legislation's principal backers, because *Title VI's standard was that of the Constitution and one that could and should be administratively and judicially applied.*" *Id.* at 338 (emphasis added).[7] Further, in this regard, the Brennan opinion stated:

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[7] Petitioners have maintained that even if the Court concludes that Title VI imposes an intent standard, the agency regulations involved herein must be upheld as "reasonably related to the purpose of the enabling legislation." (Petitioner's Brief at 29). However, the Brennan opinion correctly noted that the constitutional standard under Title VI was a standard that "could and should

> In sum, Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution.

Id. at 340.

Thus, it is clear from the Powell and Brennan opinions that a majority of the Court has interpreted Title VI as incorporating a constitutional standard. The Court has previously determined that intentional or purposeful discrimination must be proved in order to establish a violation of the Fifth or Fourteenth Amendment. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Thus, the same proof of intent or purpose is required to establish a violation of Title VI.

In *Board of Education v. Harris*, 444 U.S. 130 (1979), members of the Court again expressed their views on whether Title VI incorporates a constitutional standard of discrimination. In determining a school district's eligibility for federal financial assistance under the 1972 Emergency School Aid Act (ESAA), 20 U.S.C. §§ 1601, *et seq.*, the Court found it unnecessary to determine whether Title VI incorporates the constitutional standard of discrimination. *Id.* at 149. However, a majority

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be *administratively and judicially* applied." *Bakke*, 438 U.S. at 338 (emphasis added). In any event, it is clear that an administrative agency cannot promulgate regulations which conflict with congressional intent not to reach the employment practice in question. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973). To hold otherwise would be to allow the administrative agencies to write into the act a standard which Congress did not intend.

of the Court (Justices Blackmun, Brennan, Burger, Marshall, Stevens and White), stated that "[a] violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this dramatic result *only when the discrimination is intentional.*" *Id.* at 150 (emphasis added).[8]

The dissent of Justice Stewart, joined by Justices Powell and Rehnquist, clearly viewed the issue as having been resolved in *Bakke*. Justice Stewart in his opinion stated that:

> Title VI of the Civil Rights Act of 1964 . . . has been construed to contain not a mere disparate impact standard, but a standard of intentional discrimination. In *University of California Regents v. Bakke*, 438 U.S. 265, five members of the Court concluded that Title VI, which prohibits discrimination in federally funded programs, prohibits only discrimination violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth. *Id.*, at 281-287 (POWELL, J.); *id.*, at 328-355 (BRENNAN, J., joined by WHITE, MARSHALL, and BLACKMUN, JJ.). Those constitutional provisions, in turn, have been construed to reach only purposeful discrimination. (Citations omitted). *It thus follows from Bakke that Title VI prohibits only purposeful discrimination.*

Id. at 159-60 (emphasis added).[9] Thus, *Board of Education v. Harris* confirms that a majority of this Court

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[8] The majority also stated that "ESAA was an attempt by Congress to bring about the same remedy [desegregation] without regard to the cause of the problem, while Title VI may have been intended to remedy the problem only when its cause was intentional discrimination." *Id.* at 150 n.13.

[9] The dissent of Justice Stewart went on to state that "[t]here may be a difference between the standard of Title VI and that of § 703(a)(1) of Title VII. *But it is clear that a finding of discrimination under either provision ultimately depends upon a finding of either discriminatory motive or discriminatory intent.*" *Id.* at 162 n.9 (emphasis added).

has determined that proof of intentional or purposeful discrimination is required in order to establish a violation of Title VI.

Additional support for the view that the standard of discrimination under Title VI was determined in *Bakke* may be found in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Both Justice Powell,[10] in his concurring opinion, and Justice Marshall, joined by Justices Brennan and Blackmun,[11] stated that since the minority set-aside provision at issue did not violate the Constitution, it did not violate Title VI.

Petitioners' contention that this case is governed by *Lau v. Nichols*, 414 U.S. 563 (1974), is incorrect in light of the intervening discussions of Title VI in *Bakke*, *Board of Education* and *Fullilove*, which have effectively, if not explicitly, overruled the earlier *Lau* decision. It is important to note that *Lau* was decided prior to this Court's decisions in *Washington v. Davis*, *Dayton Board of Education* and *Arlington Heights*, which held that governmental action is not unconstitutional under the Fifth or Fourteenth Amendment in the absence of proof

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[10] Citing his opinion in *Bakke* as well as the Brennan opinion, Justice Powell concluded that "[b]ecause I believe that the set-aside is constitutional, I also conclude that the program does not violate Title VI." *Id.* at 517 n.15.

[11] Justice Marshall, also citing the Powell and Brennan opinions in *Bakke*, stated:

> On the authority of *Bakke*, it is also clear to me that the set-aside provision does not violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. In *Bakke*, five members of the Court were of the view that the prohibitions of Title VI—which outlaws racial discrimination in any program or activity receiving federal financial assistance—are coextensive with the equal protection guarantee of the Fourteenth Amendment. See 438 U.S., at 328, (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); *id.*, at 287, (opinion of POWELL, J.)." *Id.* at 517 n.1.

of discriminatory purpose or intent. The continuing vitality of *Lau* was questioned by the Brennan opinion in *Bakke*, which stated that "[s]ince we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision." *Bakke*, 438 U.S. at 352. To the extent that it has not already done so, it is submitted that this Court should expressly overrule *Lau* as being inconsistent with *Bakke* and with the expressed will of Congress that Title VI should proscribe only conduct that is also prohibited by the Constitution.[12]

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[12] Amendments to Title VI which were subsequently enacted strongly support Congress' original understanding that a constitutional standard was incorporated into Title VI. The proviso added to 42 U.S.C. § 2000d-5 in 1967 reads in pertinent part as follows:

> *Provided*, that, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

This provision was added to ensure that localities were not subjected to inconsistent administrative and judicial requirements for desegregating their school system. As the Brennan opinion recognized in *Bakke*, "[i]ts inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts." 438 U.S. at 33 n.11. Congress' inclusion of this proviso in 42 U.S.C. § 2000d-5 reconfirmed its intention that a Constitutional standard was incorporated into Title VI. Petitioners thus wrongly cite Congress' failure to adopt in 1966 a proposed amendment reiterating an intent standard under Title VI as evidence that Title VI was not limited to purposeful or intentional discrimination. In view of the overwhelming evidence that the enacting Congress was concerned solely with acts which would also violate the Constitution, the failure of a subsequent Congress to adopt the proposed amendment offers no support for petitioners' position.

B. The Legislative History Of Title VI Shows Conclusively That It Was Designed To Prohibit Only Those Acts Of Discrimination Which Are Also Violative Of The Constitution.

As a majority of this Court noted in *Bakke*, the legislative history of Title VI unequivocally establishes that Congress intended to incorporate a constitutional standard into Title VI.[13] Throughout the course of debates in both the House and the Senate, it was repeatedly emphasized that Title VI would prohibit only those acts of discrimination which would also violate the Constitution.

Senator Humphrey, a leading proponent in the Senate of the various civil rights measures, stated that Title VI was designed to eliminate those portions of federal statutes which provided for grants to institutions segregated on a "separate but equal" basis,[14] and to eliminate

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[13] Nothing cited by petitioners in their brief casts doubt on the correctness of this analysis. The petitioners, at page sixteen of their brief, quote a portion of President Kennedy's message to Congress proposing the legislation that eventually became the Civil Rights Act of 1964. In his message, President Kennedy stated that public funds should not be spent in any way "which encourages, entrenches, subsidizes, or *results* in racial discrimination." 109 CONG. REC. 11161 (1963) (emphasis added). However, it is clear when considered in context, that President Kennedy was concerned with the expenditure of public funds in an unconstitutional manner. Quoted more fully, the President's address reads as follows:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also . . .

Id.

[14] Senator Pastore also stated that the effect of Title VI would be to repeal the provisions of federal law authorizing payments of

any doubt that federal agencies have the authority to eliminate racial discrimination in their assistance programs. 110 CONG. REC. 6544 (1964). With further regard to the purpose behind the enactment of Title VI, Senator Humphrey stated:

> The purpose of Title VI is to make sure that funds of the United States are not used to support such racial discrimination. In many instances the practice of segregation or discrimination, which Title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where federal funds go to support private, segregated institutions, under the decision in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C.A. 4, 1963), certificate (sic) denied, March 2, 1964. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, *Title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.*[15]

Title VI, as evidenced by the Congressional debates, was designed to insure the equal treatment of individuals

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federal funds for "separate but equal" facilities. 110 CONG. REC. 7057, 7063 (1964). *See also id.* at 2481 (remarks of Rep. Ryan); 12575-77 (remarks of Sen. Allott); 13333 (remarks of Sen. Ribicoff); 9086 (remarks of Sen. Clark).

[15] Similarly, Senator Clark agreed with Senator Humphrey's assessment of the purpose behind Title VI when he stated:

> In other words, Title VI was directed at the evil—the very real evil—which presently exists under the Hill-Burton Act and under a number of other Federal programs in which Federal money is being used, day after day and month after month, to aid in the continuation of the programs of institutions—usually, but not always, supported by States, where discrimination on account of race or color is clear and established and, in my judgment, is unethical, immoral, and unconstitutional.

110 CONG. REC. 9086 (1964).

in a manner consistent with the equal protection notions inherent in the Fifth and Fourteenth Amendments to the Constitution. It is clear from the debates on Title VI that Congress did not intend to incorporate a standard more stringent than that required by the Constitution. Congressman Celler, in discussing the effect which Title VI would have, stated that "[i]t would, in short, assure the *existing right to equal treatment in the enjoyment of Federal funds.*" 110 CONG. REC. 1519 (1964) (emphasis added).[16]

The proponents of Title VI repeatedly stated that Title VI was intended to bring Congress and the executive branch into line with the courts, which had held in a number of important decisions that unequal treatment of individuals on the basis of race was unconstitutional. The following exchange between Senators Ribicoff and Pastore is illustrative of this point:

> MR. RIBICOFF. Is it not true, as the distinguished Senator from Rhode Island is making crystal clear—and brilliantly so—that finally the Congress of the United States is coming up to date with the Constitution of the United States and finally coming to the point which the Supreme Court reached 10 years ago?
>
> MR. PASTORE. Mr. President, in answer to the Senator from Connecticut, it is next to disgraceful for us to be appropriating money to promote, preserve, and maintain a system that the Supreme Court of the United States has said is absolutely unconstitutional.

110 CONG. REC. 7057 (1964).[17] Thus, it is evident from the Congressional debates that the reason for the enact-

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[16] *See also* 110 CONG. REC. 5864 (remarks of Sen. Humphrey); *id.* at 6562 (remarks of Sen. Kuchel); 7064 (remarks of Sens. Pastore, Pell); 7102 (remarks of Sen. Ribicoff); 5864 (remarks of Sens. Humphrey, Eastland).

[17] *See also id.* at 7102 (remarks of Sen. Ribicoff); 7064 (remarks of Sen. Ribicoff).

ment of Title VI was to eliminate those federal statutes which allowed for the distribution of federal funds to entities engaging in unconstitutional discrimination and to insure that federal funds would be disseminated in the future in accordance with the Constitution.

The comments of the supporters of Title VI lead to the inescapable conclusion that Title VI was intended to provide the means for enforcing the constitutional restriction against discrimination in the allocation of federal funds. Senator Ribicoff expressed this notion most clearly when he stated that "[b]asically, there is a constitutional restriction against discrimination in the use of federal funds; and Title VI simply spells out the procedure to be used in enforcing that restriction." 110 CONG. REC. 13333 (1964).[18]

Thus, it is evident from the extensive congressional debates that the purpose of Title VI was to ensure that the federal government would not be a partner in unconstitutional discrimination by the recipients of federal funds. Repeatedly, members of Congress expressed in unequivocal language the intent of Congress to end such violations of the Constitution where they involved the use of federal funds. Throughout the debates there was a recognition by Congress that Title VI incorporated the

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[18] In his discussion of the effect of Title VI on educational programs, Senator Humphrey clearly illustrated the fact that Title VI was designed to eliminate only those actions which were in violation of the Constitution. Thus, Senator Humphrey stated:

> *It is not expected that funds would be cut off so long as reasonable steps were being taken in good faith to end unconstitutional segregation.*

110 CONG. REC. 6545 (1964) (emphasis added). Senator Humphrey's statement is consistent with the understanding of Congress that federal funding to educational programs, as well as any other programs receiving federal monies, could only be cut-off upon a showing of discrimination prohibited by the Constitution. *See also id.* at 12677 (remarks of Sen. Allott); 7063 (remarks of Sen. Pastore).

standard of the constitution and that no violation of Title VI would occur in the absence of discrimination rising to the constitutional level. In light of the clear expression of the understanding of Congress that a constitutional standard was incorporated into Title VI and in light of this Court's decisions in *Washington v. Davis*, *Dayton Board of Education and Arlington Heights*, no violation of Title VI can occur in the absence of proof of intentional or purposeful discrimination. Petitioners made no such showing in the lower courts and accordingly, did not establish a violation of Title VI.[19]

II. THE HISTORICAL AND CONCEPTUAL CONNECTION OF § 1981 WITH THE FOURTEENTH AMENDMENT, THE LEGISLATIVE HISTORY OF § 1981, PRIOR DECISIONS OF THIS COURT, AND SOUND POLICY REASONS ALL ESTABLISH THAT PROOF OF INTENTIONAL DISCRIMINATION IS NECESSARY UNDER § 1981.

The decision of the Second Circuit, holding that proof of intentional discrimination is necessary under § 1981 is consistent with the decisions of eight other circuits[20]

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[19] It is important to note that we are not concerned in this instance with the question of whether Congress could have adopted an "effects" test under Title VI, for it is clear from the debates that Congress intended to incorporate the constitutional standard of discrimination into Title VI.

[20] *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9 (1st Cir. 1979); *Croker v. Boeing Co.*, 662 F.2d 975 (3d Cir. 1981); *Williams v. De Kalb County*, 582 F.2d 2 (5th Cir. 1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n. v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *City of Milwaukee v. Saxbe*, 546 F.2d 693 (7th Cir. 1976); *Mescall v. Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978); *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); and *Chicano Police Officer's Ass'n. v. Stover*, 552 F.2d 918 (10th Cir. 1977). *But see Kinsey v. First Regional Securities, Inc.*,

which have either held or implied that proof of intentional discrimination is necessary under § 1981. As is demonstrated herein, in order to effectuate the intent of Congress in enacting § 1981 and for sound policy reasons, the decision of the Second Circuit requiring proof of intent under § 1981 should be affirmed.

A. The Close Correlation Of § 1981 With The Equal Protection Clause Of The Fourteenth Amendment Requires Proof Of Intent Under § 1981.

This Court on numerous occasions has examined the constitutional and legislative origins of the Reconstruction era civil rights enactments.[21] A review of the historical origins and legislative history of § 1981 in particular, however, is necessary in order to provide insight into Congressional intent regarding the enactment of § 1981.

It is now clear that § 1981[22] is derived from both § 16 of the Voting Rights Act of 1870 [16 Stat. 144] and § 1 of the Civil Rights Act of 1866 [14 Stat. 27].

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557 F.2d 830, 838 n.22 (D.C. Cir. 1977). The same issue is presented in *General Building Contractors Association, Inc. et al. v. Commonwealth of Pennsylvania, et al.* (Supreme Court Nos. 81-280, 81-330, 81-331, 81-332 and 81-333), which was argued on March 3, 1982 and is awaiting decision. EEAC's brief in that case discusses the issue in somewhat more detail than is set forth herein.

[21] *See Runyon v. McCrary*, 427 U.S. 160, 168-75 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-96 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. 431, 439-40 (1973); *cf. City of Memphis v. Greene*, 451 U.S. 100, 130-135 (1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417-37 (1968).

[22] Section 1981, entitled "Equal Rights Under the Law," provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Runyon v. McCrary, 427 U.S. at 169 n.8. Section 1 of the 1866 Act[23] was enacted pursuant to § 2, the enabling clause, of the Thirteenth Amendment. *Buchanan v. Warley*, 245 U.S. 60, 78 (1917). This Court has noted on several occasions that "the operative language of both § 1981 and § 1982[24] is traceable to the Act of April 9, 1866." *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 439; *Runyon v. McCrary*, 427 U.S. at 171.

This Court and historians have recognized that a major impetus behind the enactment of the Fourteenth Amendment was the desire of Congress to incorporate into the Constitution the provisions of the 1866 Act so as to remove any constitutional doubts about the Act and to prevent a future Congress from repealing it. *Hurd v. Hodge*, 334 U.S. at 24, 32-33 (1948).[25]

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[23] Section 1 provided in pertinent part:

> That all persons born in the United States and not subject to any foreign power, ... are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[24] Section 1982, "Property Rights," provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

[25] *See also* R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 23 (1977); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908); H. GRAHAM, EVERYMAN'S CONSTITUTION 291 (1968).

Shortly after the passage of the Fourteenth Amendment, the 1866 Act was reenacted in the Voting Rights Act of 1870. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422 n.28; *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 439 n.11. The scope of the 1866 Act, however, was not altered by the 1870 reenactment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 436. Moreover, the direct linkage of the 1866 and 1870 enactments to the Fourteenth Amendment was implicitly reaffirmed by this Court following the 1874 codification of portions of the 1870 Act into § 1977 of the Revised Statutes.[26] *United States v. Wong Kim Ark*, 169 U.S. 649, 695 (1898); *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 439 n.11. In *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879), the Court noted that § 1977 put "in the form of a statute what had been substantially ordained by the [Fourteenth] amendment. It was a step towards enforcing the constitutional provisions."

As is clear from the above discussion of the origins of § 1981 and the Fourteenth Amendment, the two enactments share a common history and are expressive of the same congressional policies. Both are fundamentally equal protection enactments. Section 1 of the 1866 Act and its progeny have always been viewed as the guarantors of equal protection of the laws, or as stated by this Court in *United States v. Wong Kim Ark*, 169 U.S. at 695, "the protection of equal laws." [27]

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[26] R.S. § 1977 provided that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.

This is the precise language now codified as § 1981.

[27] *See* Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Mr. Trumbull); *id.* at 1293-94 (remarks of Mr. Shellabarger).

As set forth above, the Court has held in *Washington v. Davis*, *Dayton Board of Education* and *Arlington Heights*, that proof of a racially discriminatory intent or purpose is required in order to establish an equal protection violation. The close historical and conceptual relationship between § 1981 and the Fourteenth Amendment mandates the same standard of purposeful discrimination for § 1981 as is required under the Fourteenth Amendment.

B. The Legislative History And Prior Decisions Of This Court Establish That § 1981 Was Directed Toward Acts Of Purposeful Discrimination.

The concurring opinion of Justice White in *City of Memphis v. Greene*, 451 U.S. at 130-35, convincingly sets forth the basis for requiring proof of an intent to discriminate under § 1982. Since this Court has held that, "[i]n light of the historical interrelationship between Sec. 1981 and Sec. 1982, there is no reason to construe these sections differently when applied [to private forms of discrimination]," *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 440, the rationale of the concurring opinion in *City of Memphis v. Greene* is equally applicable to this case as an aid to the proper construction of § 1981.

As Justice White recounted in that opinion, the legislative history of the 1866 Civil Rights Act, from which both § 1981 and § 1982 derived, demonstrates that the 39th Congress, which enacted the 1866 Act, was concerned with acts of intentional discrimination designed to deny blacks their basic rights. Nothing in the extensive legislative debates supports the proposition that Congress intended the 1866 Act (and its successor, § 1981) to cover facially neutral practices which might result in a discriminatory impact or any other actions undertaken without an intent to discriminate.

As Justice White observed, "[t]he supporters of the bill emphasized time and again that the measure was designed to eradicate *blatant deprivations* of civil rights. See, e.g., Cong. Globe, 39th Cong., 1st Sess., 322, 339-340, 474-475, 516-517, 1123, 1151-1152, 1159-1160, 1833-1835 (1866)." *City of Memphis v. Greene*, 451 U.S. at 133 (White, J., concurring) (emphasis added). Similarly, various proponents of the bill stated during the debates that enactment of the bill was necessary to protect blacks from "damnable violence," "barbarous cruelties," "wrong and outrage" and "fiendish oppression." Cong. Globe, 39th Cong., 1st Sess., 631, 833, 1159, 2773 (1866). Numerous instances of beatings and murders of freedmen were recounted during the course of the debates on the Freedmen's Bureau Bill, S. 60, 39th Cong., 1st Sess. (1866) and the Civil Rights Bill. For example, Senator Creswell commented that "combinations of returned rebel soldiers have been formed for the *express purpose* of persecuting, beating most cruelly, and in some instances actually murdering the returned colored soldiers of the Republic." Cong. Globe, 39th Cong., 1st Sess., 339 (1866) (emphasis added).

Prior to the formal ratification of the Thirteenth Amendment in December 1865, a number of the southern states had enacted legislation designed to deny to blacks their basic civil rights.[28] Many of the "Black Codes" contained "vagrancy laws" under which vagrants were typically defined as persons without employment or bus-

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[28] These legislative enactments of southern states were known as "Black Codes" and most contained express restrictions on the property, employment and marriage rights of blacks. The Mississippi "Black Code", which was the most debated of the codes, expressly prohibited blacks from owning farm land. 1865 Miss. Laws § 1. For the substance of the "Black Codes", see H.R. EXEC. DOC. No. 118, 39th Cong., 1st Sess.; S. EXEC. DOC. No. 6, 39th Cong., 2d Sess.; E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29-44 (1871); K. STAMPP, THE ERA OF RECONSTRUCTION 79-81 (1965).

iness. *See* E. MCPHERSON, *supra*, at 29-44. Commonly the vagrancy laws authorized local authorities to arrest vagrants and hire them out at litle or no pay. Justice White correctly noted in *City of Memphis v. Greene*, 451 U.S. at 134-35 n.6 (White, J., concurring) that the legislative references to these "ostensibly neutral" statutes provide no basis to infer the creation of a disparate impact standard. Rather, Congress' concern was that these laws were intentionally used to oppress blacks. The Congressional debate surrounding the enactment of these vagrancy laws focused on the fact that they were passed with an intent to discriminate against recently freed blacks:

> Vagrant laws have been passed; laws which under the pretense of selling these men as vagrants, are *calculated and intended* to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude . . . .

Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (remarks of Mr. Cook) (emphasis added); *see also id.*, at 1151 (remarks of Mr. Thayer), 1160 (remarks of Mr. Windom).

The legislative record is thus replete with evidence that § 1981 was designed to eradicate intentional discrimination of the sort then prevalent in the South. On the other hand, there is *nothing* in the extensive legislative history of § 1981 which supports the proposition that Congress was concerned with anything other than intentional or purposeful discrimination.

Prior decisions of this Court finding violations of § 1981 and related Reconstruction era legislation have all involved instances of intentional discrimination. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 426, this Court, in reference to § 1 of the 1866 Act and § 1982—but with equal applicability to § 1981—held that § 1 of the 1866 Act was intended to prohibit all "racially motivated" deprivations enumerated in the statute. Similarly, in *Runyon v. McCrary*, 427 U.S. at 170-71, this Court held

that § 1981 is violated "if a private offeror refuses to extend to a Negro, *solely because he is a Negro*, the same opportunity to enter into contracts as he extends to white offerees" (emphasis added). Thus, both *Jones* and *Runyon* support the requirement of proof of purposeful discrimination under § 1981.[29]

C. Sound Policy Reasons Exist For Requiring Proof Of Intent Under § 1981.

In *Washington v. Davis*, this Court explained the practical consequences which would flow from applying a disproportionate impact standard to Fourteenth Amendment claims:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and, perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. at 248 (citation omitted). The Court concluded that extension of the disproportionate impact standard beyond those areas where it is already available by virtue of Title VII "should await legislative prescription." *Id.* Adoption of an impact standard under § 1981 might well produce the "far reaching" result which the Court in *Washington v. Davis* expressly sought to avoid. Furthermore, since the scope of § 1981's prohibitions is virtually coextensive with that of the equal protection clause of the Fourteenth Amendment, if a lesser standard of liability is applied to § 1981 than to the Fourteenth Amendment, the holding in *Washington v. Davis* could be circumvented entirely by alleging a § 1981 rather than a Fourteenth Amendment claim.

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[29] *See also Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) for the application of an intent standard to 42 U.S.C. § 1985 (3).

Since § 1981 contains none of the administrative prerequisites required under Title VII and since § 1981 provides longer limitations periods and possibly additional relief unavailable under Title VII, the adoption of an impact standard under § 1981 would encourage plaintiffs to bypass the congressionally mandated administrative process of Title VII. This would be contrary to the intent of Congress favoring voluntary attempts to resolve charges of employment discrimination through the administrative procedures set forth in Title VII. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

CONCLUSION

For the foregoing reasons, it is submitted that the Court should affirm the decision of the court of appeals based upon the failure of the Petitioners to demonstrate the requisite intentional or purposeful discrimination necessary to establish violations of § 1981 and Title VI.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
THOMAS R. BAGBY
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae, Equal Employment Advisory Council

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GUARDIANS ASSOCIATION, *et al.*,

Petitioners,

—against—

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE*

ARTHUR N. EISENBERG
(Counsel of Record)
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

E. RICHARD LARSON
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amici Curiae

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INTEREST OF AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the fundamental civil rights and civil liberties of the people of the United States. The New York Civil Liberties Union (NYCLU) is the ACLU's state affiliate in New York.

Central among the fundamental rights and liberties within our society is the right to be free from discrimination on grounds of race or ethnicity. Because of the crucial importance of this fundamental right of equality, the ACLU, in a variety of cases before this Court and before numerous other tribunals, has insisted upon a national commitment to equality and to antidiscrimination principles.

*/ The parties have consented to the filing of this brief, and documents conferring consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

In such cases, the ACLU has consistently argued, inter alia, that Congress is empowered to enact remedial legislation outlawing all forms of racial discrimination, whether racially motivated or not; and that persons, who are victimized by racial discrimination should not be required to bear onerous burdens in proving scienter where it serves no justifiable purpose and where such a requirement merely facilitates and encourages retention of discriminatory practices that have no countervailing benefit whatsoever to an identified defendant or to society at large. The ACLU further believes that in Title VI of the Civil Rights Act of 1964 and in 42 U.S.C. 1981, Congress engaged in such appropriate remedial lawmaking. These are matters that are raised by the instant case. They are matters that the ACLU and NYCLU seek to address as amici curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is the position of amici that proof of purposeful discrimination is not an essential ingredient to the establishment of a prima facie case under either Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, or under 42 U.S.C. 1981.[1/]

Amici's conclusion, with regard to Title VI, looks to Supreme Court precedent; to the legislative history upon which that precedent relied; to the fact that agency regulations that have been promulgated, pursuant to Title VI, do not require proof of intentional discrimination; and, finally, to the fact that anti-discrimination statutes, similar in purpose to Title VI, do not require proof of intentional discrimination. In Point I of the Argument that is

1/ The scope of 42 U.S.C. 1981 was vigorously debated in County of Los Angeles v. Davis, 440 U.S. 625 (1979) (vacated and

(fn. cont. on next page)

set forth at pp.5-22 below, each of these matters will be presented in brief compass.

While Point I will present a somewhat general overview of our position with respect to Title VI, in Point II we shall focus somewhat more specifically upon a discrete and narrow aspect of the Title VI issue. Point II will critically examine

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(fn. cont. from preceding page) remanded as moot). And, in an amicus brief that was submitted to this Court in the Davis case, the A.C.L.U. presented an extensive discussion of the legislative history of 42 U.S.C. 1981, with a view towards demonstrating, inter alia, that the Thirty-Ninth Congress did not intend to impose a "scienter" requirement when it enacted the precursor to 42 U.S.C. 1981. We will, therefore, not burden the Court with an extensive rehearsal of the arguments previously presented in our brief in the Davis case. Rather we simply refer the Court to our arguments presented in that case. See also the amicus brief submitted by the NAACP Legal Defense Fund in the Davis case, Respondents' Brief in the Davis case, as well as the brief submitted by Respondents in Memphis v. Greene, 49 U.S.L.W. 4389 (April 20, 1981).

the perception that Title VI requires proof of intentional discrimination because, when Congress enacted the Civil Rights Act of 1964, it thought that it was writing a "constitutional standard" into Title VI. We conclude that this perception overlooks the fact that the constitutional equal protection standard that existed in 1964 allowed race discrimination claims to be based upon disparate impact, without actual proof of racial animus. For example, race discrimination claims with respect to jury selection and voting rights cases were commonly established, under the equal protection clause, on the basis of statistical evidence. Thus, even assuming arguendo that Congress intended to write a constitutional standard into Title VI of the Civil Rights Act, the constitutional equal protection standard in race cases, in 1964, was one that

permitted the establishment of a prima facie case with proof of statistical disparities and without proof of racial animus.

Each of these matters will be discussed, in turn.

ARGUMENT

I.

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS RECIPIENTS OF FEDERAL FUNDING, SUCH AS THE INSTANT RESPONDENTS, FROM ENGAGING IN UNJUSTIFIED PRACTICES THAT HAVE A RACIALLY DISCRIMINATORY EFFECT UPON MINORITIES.

A. Supreme Court Precedent As Well As The Legislative History Upon Which That Precedent Relied, Support The Proposition That Proof Of Purposeful Discrimination Is Not Essential To A Finding Of A Title VI Violation.

In Lau v. Nichols, 414 U.S. 563 (1974), this Court examined the proscriptive reach of Title VI of the Civil Rights Act of 1964. In so doing, the Court explicitly rejected the claim that a finding of purposeful discrimination is an essential prerequisite to a conclusion that Title VI has been violated. Writing for the Court in Lau, Justice Douglas held that under Title VI,

> "Discrimination is barred which has the effect though no purposeful design is present: a recipient 'may not...utilize criteria or methods of

> administration which have the effect of subjecting individuals to discrimination.'" 414 U.S. at 568 (emphasis in original).

This Court's conclusion in Lau has not been reversed by subsequent case law.[2/]

2/ In University of California v. Bakke, 438 U.S. 265 (1978), Justice Powell expressed the view that Title VI proscribed only those racial classifications that would violate the equal protection clause of the Fourteenth Amendment. It is not, however, clear that Justices Brennan, White, Marshall, and Blackmun agreed with Justice Powell's view that in all instances Title VI imposed an "intent" rather than an "impact" standard. For example, as Judge Coffrin suggested in the Court below: "Lau [and Bakke] may be read [together] for the proposition that Title VI permits agencies that administer Title VI funds to impose an impact standard in their regulations although Title VI does not itself require such a standard." Guardians Association v. Civil Service Commission, 633 F. 2d 232, 275 n. 4 (2nd Cir. 1980). 633 F. 2d at 232. Indeed, the Second Circuit in Board of Education v. Califano, 584 F. 2d 576, 588-589 & n. 38 (2nd Cir. 1978) aff'd on other grounds, sub. nom. Board of Education v. Harris, 444 U.S. 130 (1979), seemed to subscribe to such a view.

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Indeed, the legislative history of the Civil Rights Act of 1964 confirms the view, expressed by the Lau Court, that Title VI prohibits practices which have a discriminatory effect, where such practices cannot be justified as necessary to the advancement of compelling governmental interests.

The Act, of course, was premised upon Congress' recognition--ten years after Brown v. Board of Education, 347 U.S. 483 (1954)--that blacks and other members of discrete and insular minority groups continued to be victimized by racial and ethnic discrimination.

(fn. cont. from preceding page)

Alternatively, Justice Brennan's opinion in Bakke might be viewed as holding only that, in measuring the propriety of an affirmative action program designed to remedy past discrimination, Title VI would not stand in the way of such a program any more than the Fourteenth Amendment would. See Bakke, supra at 328. Under such an interpretation Bakke could not be said to have overruled Lau v. Nichols, supra.

Congress was concerned not merely with intentional and malevolent acts of discrimination but also with the cumulative impact of over two hundred years of racial disadvantage. Congress was aware, as Professor Paul Brest has observed, that

> "[t]he effects of discrimination may attenuate over time or be submerged in superseding events. But the injuries inflicted by discrimination can place its victims at a disadvantage in a variety of future endeavors, and the discrimination can also perpetuate itself by altering the social enenvironment to harm new generations of victims. Discrimination often works its injuries through practices, not themselves race-dependent, implemented by institutions that have not themselves discriminated. Past and remote discrimination often manifest themselves in racially disproportionate impact, and...antidiscrimination principles may therefore support its amelioration or elimination."

Brest, Forward: In Defense of the Antidiscrimination Principle, 90 Harv. L.

Rev. 1, 31 (1976).

Title VI's legislative history reflected this approach from the outset. In his message to Congress calling for the enactment of Title VI, President Kennedy emphasized the need to prohibit practices that have a discriminatory effect:

> "Simple justice requires that public funds, to which all taxpayers contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination." H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess., 3 & 12 (1963) (emphasis added)

This message was not lost on Congress. In fact, the above-quoted portion of the message was repeated during the floor debates in the Senate by Senator Humphrey, floor manager of the Civil Rights Act. 110 Cong. Rec. 6543. Such legislative history was thought to be persuasive by the Court in Lau v. Nichols, 414 U.S. 563,

569 (1974).

Moreover, when, in 1972, Congress enacted the Stennis Amendment to both Title VI and the Emergency School Aid Act (ESAA) an impact standard was reasserted. As applied to Title VI, the Stennis Amendment provides, in relevant part, that, "[i]t is the policy of the United States that guidelines and criteria established pursuant to Title VI of the Civil Rights Act of 1964...dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local education agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation." 42 U.S.C. 2000d-6(a) (emphasis added).

The statutory language of the Stennis Amendment is quite clear. As this Court noted in Board of Education, New York City

v. Harris, 444 U.S. 130, 146-147 (1979), the legislative history of the amendment "indicates that the statute means exactly what it says: the same standard is to govern nationwide, and is to apply to de facto segregation as well as to de jure segregation. It suggests ineligibility rules that focus on actualities not on history, on consequences, not on intent." Thus, in Harris, this Court expressed the view that the Stennis Amendment, as it affected the Emergency School Aid Act (ESAA), was intended to reconfirm the congressional desire to have ESAA prohibit school districts from implementing policies that had discriminatory effects. And to the extent that the Stennis Amendment, as applied to Title VI, is virtually identical to the provisions of the amendment that apply to ESAA, it follows that the Stennis Amendment

represents, as well, a congressional reconfirmation of an "impact standard" under Title VI. 3/

3/ The Harris Court did not reach the issue as to whether the Stennis Amendmend imposed or reconfirmed an "impact standard" with regard to Title VI. Justice Blackmun, writing for the Court, id. at 146 n. 10, did suggest that "it is not at all 'wholly incongruous' to hold...that the Stennis Amendment" might reflect a congressional desire to impose an "impact standard" with regard to ESAA and at the same time reflect a legislative intent to impose a "purposeful-discrimination test" when applied to Title VI. Nevertheless, writing for the Court, Justice Blackmun did not purport to decide whether the Stennis Amendment, as it applied to Title VI, did, in fact, reflect a legislative desire to impose an intentional discrimination standard.

Writing in dissent, Justice Stewart did argue that it is "wholly incongruous" to conclude that the Stennis Amendment attempted to impose an "impact" standard when applied to ESAA and an "intent" standard when applied to Title VI. Justice Stewart, therefore, concluded that under both ESAA and Title VI the Stennis Amendment reflected a congressional desire to reach only intentional discrimination.

In the opinion of amici, Justice Stewart was only half correct. The virtually identical language of the Stennis Amendment as applied to both ESAA and Title VI

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In sum, the legislative history surrounding the enactment of Title VI as well as subsequent congressional reconfirmation of that legislative history with the enactment of the Stennis Amendment reflect an intention not to require explicit proof of purposeful discrimination as a prerequisite to the finding of a Title VI violation.

B. Administrative Regulations, Promulgated Pursuant To Title VI, Support The Proposition That Proof Of Purposeful Discrimination Is Not Essential To The Finding Of A Title VI Violation.

The proposition that proof of purposeful discrimination is not essential to a

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suggests that the amendment was intended to reach the same sorts of discrimination. Moreover, the clear statutory language suggests an intent to prohibit school districts from implementing policies that were intentionally discriminatory as well as those that had discriminatory consequences.

finding of a Title VI violation is also supported by examining administrative regulations promulgated pursuant to the statute. Thus, the trial judge in the present case examined such agency regulations and concluded that,

> "Support for the thesis that Title VI does not ban only intentional discrimination is overwhelming. The regulations are full of language that evidence an intent to disallow practices with a discriminatory impact. For example, 24 C.F.R. §1.4(b)(2)(k) (H.U.D.) prohibits a recipient from utilizing 'criteria or methods of administration which have the effect of subjecting persons to discrimination.' Similar provisions may be found at 28 C.F.R. §42.104(b)(2) and (3) (Justice), and 29 C.F.R. §31.3(b)(3) (Labor)." Guardians Association v. Civil Service, 466 F. Supp. 1273, 1285 (S.D.N.Y. 1979)

In addition to the citations provided by Judge Carter, other administrative provisions might have been examined as

examples of Title VI regulations that permit a prima facie case of discrimination to be based upon racially disparate impact. Thus, for example, 45 C.F.R. §80.3(b)(2) provides:

> "A recipient, in determining...the class of individuals to be afforded an opportunity to participate in any...program, may not... utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."

Since the foregoing regulation explicitly prohibits the utilization of criteria that have "the effect" of subjecting individuals to discrimination, it plainly prohibits procedures that have a disparate impact upon racial minorities as well as conduct that is purposefully discriminatory. See also, 45 C.F.R. §80.3(b)(3).[4/]

4/ Similarly, 45 C.F.R. §80.3(b)(1)(iii) provides:

> "A recipient...may not, directly or through

(fn. cont. on next page)

This Court has repeatedly insisted upon judicial deference to administrative agencies whose responsibilities it is to enforce congressional enactments and to promulgate regulations in furtherance of such enforcement. Thus, the Court has often stated that these agency regulations are "entitled to great weight." Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433, 434 (1971); See, Justice Stewart's concurrence, joined by Chief Justice Burger and Justice Blackmun, in Lau v. Nichols, supra at 570-571, which

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contractual or other arrangements, on ground of race, color, or national origin:

> Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program."

noted that, regardless of whether the defendant school district had violated Title VI, it had clearly violated HEW's valid Title VI regulations.

In promulgating extensive Title VI regulations that proscribe racially disparate impact, the agencies that are primarily responsible for interpreting and enforcing Title VI have, by their regulatory conduct, evinced the sense that Title VI was intended to extend to both intentional discrimination as well as conduct with a discriminatory impact. As noted above, these administrative interpretations are entitled to judicial deference. Lau v. Nichols, supra at 571; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-281 (1969). And they reinforce the conclusion that Congress intended to reach beyond merely purposeful discrimination.

C. Anti-discrimination Statutes Similar In Thrust To Title VI Do Not Require Proof Of Intentional Discrimination.

The major civil rights statutory provisions, Title VII, 42 U.S.C. §§2000e, et. seq., and Title VIII, 42 U.S.C. §§3601, et seq., share the same ultimate goal as Title VI, namely, the desire to end racial injustice and to fulfill the promise of equal opportunity. These major civil rights anti-discrimination statutes have been held by the federal courts to prohibit practices that have a racially disparate impact, even where no purposeful discrimination has been shown.

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), this Court explicitly rejected the claim that Title VII prohibits only intentional acts of discrimination. Writing for a unanimous Court, Chief Justice Burger stated:

> "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."
>
> * * *
>
> "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Id. at 431-432.

The discrimination standard set forth in Griggs was reaffirmed in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), where the Court quoted Griggs with approval: "'Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation.'" 422 U.S. at 422 (citation

omitted). And, even after Washington v. Davis, 426 U.S. 229 (1976), this Court has continued to utilize an "impact" standard with respect to Title VII. See, Dothard v. Rawlinson, 433 U.S. 321 (1977).

The dichotomy between the narrow definition of discrimination under the Constitution and the broader standard under the federal anti-discrimination statutes is also illustrated by Title VIII of the Federal Fair Housing Act, 42 U.S.C. §3601 et. seq. Under Title VIII, the Courts of Appeals have uniformly held that proof of discriminatory effect alone is sufficient to constitute a violation. Resident Advisory Board v. Rizzo, 565 F. 2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); Metropolitan Housing Development Corp. v. Arlington Heights, 558 F. 2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); Smith v. Anchor

Building Corp. 536 F. 2d 231 (8th Cir. 1976); United States v. City of Black Jack, 508 F. 2d 1179, 1183 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). See also, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F. 2d 108, 114 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1975).[5/]

5/ Of particular relevance is the Arlington Heights litigation. Subsequent to Washington v. Davis, the Supreme Court in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) held that proof of discriminatory intent was necessary under the Constitution, and remanded the case to the Seventh Circuit for consideration of the Title VIII claims. On remand, the Seventh Circuit analyzed the broader goals of Congress under the anti-discrimination statutes, and held that a violation of Title VIII "can be established by a showing of discriminatory effect without a showing of discriminatory intent." Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F. 2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).

In sum, the major anti-discrimination statutes that emerged from the civil rights struggles of the 1960's have been consistently interpreted by the courts as capable of reaching not only intentional discrimination but also unjustified practices that imposed racially disparate consequences. Title VI, born out of the same impulse to end racial injustice, is entitled to no less of a reading.

II.

EVEN ASSUMING ARGUENDO THAT CONGRESS INTENDED TO WRITE A CONSTITUTIONAL STANDARD INTO TITLE VI, THE CONSTITUTIONAL EQUAL PROTECTION STANDARD THAT PERTAINED IN 1964 WAS ONE THAT CONTEMPLATED THE USE OF STATISTICAL DISPARITIES TO ESTABLISH A *PRIMA FACIE* CASE OF RACIAL DISCRIMINATION.

In *University of California Regents* v. *Bakke* 438 U.S. 265 (1978), Justice Powell examined the "voluminous legislative history of Title VI" and found that when Congress enacted the Civil Rights Act of 1964 it believed that it was writing a "constitutional standard" into Title VI. *Id.* at 284-287. In the instant case, the Second Circuit accepted this conclusion and reasoned that since we now know that the "constitutional standard" requires proof of purposeful discrimination (*See*, *Washington* v. *Davis*, 426 U.S. 229 (1976)), it must follow that, in 1964, Congress believed this same requirement would be imposed as an element of Title VI. *See* Judge Coffrin's

concurring opinion in Guardians Association v. Civil Service Commission, supra at 274-275.

This analysis fails, however, because it ignores the lesson in legislative interpretation provided by this Court in Cannon v. University of Chicago, 441 U.S. 677 (1979). It is plain that in assessing legislative intent one must evaluate the language of legislators in the context of the historical period in which they were speaking. This point was appropriately emphasized by the Court in Cannon, supra at 698-699:

> "[O]ur evaluation of congressional action... must take into account its contemporary legal context. In sum, it's not only appropriate but also realistic to presume that Congress was thoroughly familiar with... important precedents from this and other federal courts and that it expected its enactment

to be interpreted in
conformity with them."

Indeed, in applying to Title VI the contextual approach commended by Cannon, it is necessary to examine the doctrinal development of the equal protection clause as of 1964, the year in which Title VI was enacted. Such an examination reveals that the constitutional equal protection standard that existed in 1964, allowed--in some cases at least--racial discrimination claims to rest upon statistical disparities, even without actual proof of illicit motive.

For example, in race discrimination claims regarding jury selection, well settled equal protection doctrine permitted the finding of a prima facie constitutional claim on the basis of statistical disparities between the races. In Arnold v. North Carolina, 376 U.S. 773 (1964) this Court, in a per curiam opinion, reversed the

conviction of two persons found guilty of murder upon the grounds that blacks had been systematically excluded from the grand jury that had returned the two indictments. In so doing, the Court evaluated overwhelming statistical evidence reflecting racial disparities regarding grand jury participation of whites as compared with blacks. The Court concluded that the statistical evidence "in itself made out a prima facie case of the denial of the equal protection, which the Constitution guarantees." Id. at 774. In reaching this result and in employing this methodology of analysis, the Court asserted that the 1964 Arnold decision was entirely consistent with established precedent in jury selection cases. The Court cited Norris v. Alabama, 294 U.S. 587 (1935); Eubanks v. Louisiana, 356 U.S. 584 (1958); and Hernandez v. Texas, 347 U.S.

475 (1954).

Indeed, in Eubanks, supra at 587, local officials' explicit testimony that they did not intend to discriminate was found inadequate to rebut the statistical showing that blacks had been excluded from juries. And in Hernandez, supra, at 481-482, Chief Justice Warren took note of significant ethnic disparities in the exclusion of persons from the juries. He further observed that the state had sought "[t]o rebut the strong prima facie case of the denial of...equal protection...[by offering] the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin American descent in selecting jurors. [The commissioners] stated that their only objective had been to select those whom they thought were

best qualified." Id. at 481. Chief Justice Warren, nevertheless, discounted this testimony, observing that: "The result bespeaks discrimination, whether or not [such exclusion involved] a conscious decision on the part of any individual jury commissioner." Id. at 482 (emphasis added).

Similarly, by 1964, voting discrimination cases also permitted civil rights plaintiffs to establish a prima facie equal protection violation with evidence of statistical disparities. Thus, United States v. Dogan, 314 F. 2d 767 (5th Cir. 1963) involved a challenge to policy and procedures employed by Mississippi officials regarding the imposition of poll taxes upon potential voters. The policy was facially neutral, yet substantially all of the 5,099 white persons of voting age who were liable to pay poll taxes had been permitted to do so and had, therefore, been permitted to

register; at the same time, not one of the county's 6,483 blacks had been permitted to pay the tax and, therefore, all were disenfranchised. In this circumstance, the Fifth Circuit directed the entry of a preliminary injunction against the local procedures. In doing so the Court noted: "[i]n the problem of racial discrimination, statistics often tell much, and Courts listen." Id. at 772.

Other voting rights cases, during the early 1960s, similarly looked to statistical disparities to establish a prima facie case of discrimination. See, e.g. Alabama v. United States, 304 F. 2d 583 (5th Cir. 1962); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1963); United States v. Clement, 231 F. Supp. 913 (W.D. La. 1964) rev'd on other grounds, 358 F. 2d 89 (5th Cir. 1966); United States v. Mississippi, 339 F. 2d 679 (5th Cir. 1964).

And in the 1964 case of Anderson v. Martin, 375 U.S. 399 (1964), a unanimous Supreme Court invalidated a Louisiana statute that had required electoral ballots to designate the race of candidates for elective office. Louisiana argued that the statute was "nondiscriminatory because the labeling provision applie[d] equally" to blacks and whites. Id. at 403-404. The Court quite plainly rejected this contention. It found that ,

> "in light of 'private attitudes and pressures' towards [blacks] at the time of [its] enactment [the law] could only result in that 'repressive effect' which 'was brought to bear only after the exercise of governmental power.' [citation omitted]." Id. at 403.

Finally, a school desegregation case decided by the Court in 1964 also demonstrates that the equal protection standard of that era contemplated inquiry into

discriminatory effect without necessarily looking to testimonial evidence of illicit motive. Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) involved a decision by the county's Board of Supervisors not to fund the public schools but rather to pay tuition grants to children attending nonsectarian private schools. The county's policy apparently treated blacks and whites equally. Nevertheless, a unanimous Court found this practice violative of the equal protection clause of the Fourteenth Amendment. Writing for the Court, Justice Black, addressed the policy's impact:

> "Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools....

> [T]he result is that Prince Edward County school children, if they go to school in their county must go to racially segregated schools..." Id. at 230.

Under Justice Black's methodology of analysis, the discriminatory effect of the policy plainly established a prima facie equal protection claim.[6/] And, ultimately, upon concluding that the county failed to provide an adequate non-racial justification for the policy, a constitutional violation was found.

6/ In Palmer v. Thompson, 403 U.S. 217, 225 (1971), Justice Black expressly explained the Griffin case, as well as the Court's decision in Gomillion v. Lightfoot, 364 U.S. 339 (1960), as turning upon the discriminatory effect of the governmental conduct. Justice Black observed, supra at 225: "It is true that there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. [citing Griffin and Gomillion]. But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did."

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Congress was undoubtedly familiar with many, if not most, of these important

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Indeed, in rejecting a motive inquiry in Palmer v. Thompson, supra at 224, Justice Black concluded that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. The pitfalls of such analysis were set forth clearly in the landmark opinion of Mr. Chief Justice Marshall in Fletcher v. Peck, 6 Cranch 87 (1810)."

Moreover, in rejecting a motive inquiry in Palmer v. Thompson, Justice Black might have appropriately believed that his analysis was entirely consistent with long-standing constitutional doctrine. Thus, in 1962, Alexander M. Bickel had written that "[t]he established view is that inquiries into motive are not open in the Supreme Court." Bickel, The Least Dangerous Branch (1962) at 208. Bickel quoted Justice Cardozo as saying: "'There is a wise and ancient doctrine that the Court will not inquire into the motives of a legislative body or assume them to be wrongful.' 'The process of psychoanalysis,' he remarked, must not be carried into such 'unaccustomed fields.'" Id. Bickel further quoted Thomas M. Cooley's treatise as teaching: "The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal,

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judicial precedents. And although Washington v. Davis, 426 U.S. 229 (1976)

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honest or corrupt...." Id.

Justice Black's analysis in Palmer was, of course, reversed by this Court in Washington v. Davis, 426 U.S. 229 (1976). Nevertheless, this reversal cannot be said to alter the fact that prior to Washington v. Davis and clearly by the middle 1960's, many constitutional scholars and jurists believed that the appropriate inquiry under the equal protection clause extended to statistical disparities and did not necessarily permit inquiry into legislative motive.

Thus, in evaluating Congress' understanding of constitutional doctrine in 1964,one cannot do so from the hindsight of the Court's Washington v. Davis opinion. The fact is that, prior to Washington v. Davis, there was "a conflicting mass of precedent on the proper role of impact in constitutional adjudication." Eisenberg, "Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication,"52 N.Y.U. Law Rev. 36, 39 (1977); See also Ely "Legislative and Administrative Motivation in Constitutional Law," 79 Yale L.J. 1205 (1970); Brest, "The Supreme Court, 1975 Term--Forward: In Defense of the Antidiscrimination Principle,"90 Harv. L. Rev. 1 (1976). Such precedent would most likely have lead Congress to believe, in 1964, that an equal

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now teaches us that these precedents were widely misinterpreted, it is a mistake to evaluate Congress' intent vis-a-vis Title VI in terms of our present understanding of constitutional doctrine. Justice Stevens was quite correct, when in Cannon v. University of Chicago, supra at 711, he suggested that,

> '"the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.'"

Thus, in light of cases such as Arnold v. North Carolina, supra; Hernandez v. Texas, supra; United States v. Dogan, supra; and Griffin v. School Board of Prince Edward County, supra, it is far more likely than not that when Congress talked of a constitutional equal protection

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protection claim could be established, at least in some cases, on the basis of racial disparate impact.

standard, as part of the legislative debate in 1964, the constitutional standard it had in mind contemplated the use of an "impact" standard to establish a prima facie case. Placing congressional statements in their proper historical and legal context thus reinforces the finding of Lau v. Nichols, supra, to the effect that purposeful discrimination was not intended to be a prerequisite to a prima facie finding of a Title VI violation.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed to the extent that the Court below ruled that proof of intentional discrimination is an essential ingredient to the establishment of claims under Title VI of the Civil Rights Act of 1964 and under 42 U.S.C. 1981.

Respectfully submitted,

ARTHUR N. EISENBERG
(Counsel of Record)
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

E. RICHARD LARSON
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amici Curiae

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Docket Sheet

NO. 81-431-CFX	TITLE	Guardians Association, etc., et al., Petitioners
VIDE: 81-432		v. Civil Service Commission of the City of New York, et a

DOCKETED	COURT
Aug. 31, 1981	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Christopher Crowley
	Counsel for Respondents: Leonard Koerner
Aug. 31, 1981	Petition for writ of certiorari filed. (Record filed).
Aug. 31, 1981	Joint appendix filed.(Vide: 81-432)
Oct. 14, 1981	DISTRIBUTED. 10-30.
Oct. 29, 1981	Response requested.
Nov. 30, 1981	Brief for the respondents in opposition filed.
Dec. 2, 1981	DISTRIBUTED. 1-8.
Jan. 11, 1982	Petition GRANTED.

Jan. 25, 1982	Motion of the parties to dispense with printing the joint appendix filed.
Jan. 27, 1982	DISTRIBUTED. 2-19. (Above motion).
Feb. 18, 1982	Order extending time to file the petitioners' brief on the merits until March 28, 1982.
Feb. 22, 1982	The motion of the parties to dispense with printing the joint appendices is GRANTED.
Mar. 29, 1982	Brief, amici curiae, of The American Civil Liberties Union and the New York Civil Liberties Union filed.
Mar. 29, 1982	Brief for the petitioner filed.
Mar. 29, 1982	Brief, amici curiae, for The Asian American Legal Defense and Education Fund, et al. filed.
Mar. 31, 1982	Brief, amicus curiae, of the NAACP filed.
Apr. 21, 1982	Order extending time to file the respondent's brief on the merits until May 26, 1982.
May 26, 1982	Brief, amicus curiae, of The Equal Employment Advisory Council in support of respondents filed.
May 28, 1982	Brief for the respondents filed.
July 13, 1982	CIRCULATED.
Oct. 22, 1982	Reply brief for the petitioners filed. (D).
Nov. 1, 1982	ARGUED.